

Conference on Enforced Disappearances

Berlin, 25 April 2012

Imprint

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The German Institute for Human Rights

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Documentation

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Preface

On 25 April 2012, the German Institute for Human Rights, the Nuremberg Human Rights Centre and the University of Erlangen–Nuremberg co-hosted an international conference on enforced disappearances in Berlin. This documentation provides a retrospective of the conference.

The hosts' intention behind the conference was to bring together a select group of international experts from the fields of human rights and public international law to discuss a number of core issues and to raise public awareness with regard to the International Convention for the Protection of All Persons from Enforced Disappearance (CPED). The CPED is the youngest of the so-called core international human rights treaties elaborated within the United Nations. It entered into force on 23 December 2010, four years after its adoption by the UN General Assembly. Its purpose is to protect any person against what the international community considers, at the very least, a serious crime – in certain cases even a crime against humanity.

As of today and almost seven years after its adoption, 40 states out of the 93 signatories have signed it since 2007. While ratification of other international human rights treaties may have proceeded slower in comparison, it cannot be overlooked that less than half of the signatories have ratified the Convention so far. This illustrates that despite international agreement on the necessity to collectively act against enforced –disappearances as demonstrated by General Assembly Resolution 47/133 of 18 December 1992—, only a minority of members of the international community has shown a willingness to accept a legally binding instrument for that purpose. Also, some of the states that have ratified the CPED have narrowed the scope of their acceptance by limiting the competence of the CPED treaty body, the Committee on Enforced Disappearance (CED), to receive

communications. These states should be encouraged to follow the example of Germany which in 2012, after initially belonging to the group of objectors with regard to individual communications, decided to withdraw its reservations.

Against this background, the CED first focused on developing technical and procedural arrangements in order to become fully operational, in particular with regard to individual and state communications. Here, the CED benefited from the experiences of the other treaty bodies, but it also had to break new ground with respect to the new urgent action mechanism according to Article 30 CPED. The contributions by CED Chairman Professor Emmanuel Decaux and CED member Rainer Huhle deal with these issues in greater detail. These activities prepared the ground for the Committee's dealing with substantive issues under the Convention through the examination of state reports. Interpreting the substantive provisions of the CPED raises numerous questions, which are addressed by Gabriella Citroni, who had participated in the negotiations on the CPED. One of these questions is how to understand and implement the obligation to penalize enforced disappearance. Taking Germany as an example, Leonie von Braun examines the character of enforced disappearance and identifies the elements of this crime that need to be covered by a criminal law provision.

To safeguard the best possible contribution of the Committee to the eradication of the crime of enforced disappearance, it is imperative to take into account the work of other international bodies, in order to use synergies and avoid overlap. Hence, Maria Giovanna Bianchi examines the complementarity and differences between the CED and the UN Working Group on Enforced or Involuntary Disappearances (WGEID), and Nina Schniederjahn analyses the work of international human rights courts.

As CED Chairman Professor Emmanuel Decaux rightly emphasised, "the purpose of the Convention is precisely to restore the law at the heart of the demand for justice and reparation through mechanisms of prevention and protection, early warning and monitoring, investigation and safeguards, with a new form of habeas corpus". Numerous speakers at the conference stressed that the crime of enforced disappearance concerns all states and all continents regardless of a country being – in the Chair's words – an "old democracy" or a "dictatorship". Certain activities by "old democracies" in the course of the international fight against terrorism – secret detention facilities and rendition flights come – to mind illustrate this point.

In view of these considerations and the low ratification rate, it is necessary for UN bodies, member states, NGOs and National Human Rights Institutions to join forces. As the contribution of Ambassador Schumacher demonstrates, there are numerous ways to promote the acceptance of CPED by UN member states. NGOs and NHRIs have important contributions to make, through raising awareness domestically or, at the international level, through parallel reports and other forms of participation in the examination of state reports, through support for victims bringing individual complaints or, in the case of NHRIs, through *amicus curiae* briefs to the Committee. In the end, however, the governments are the key to success. Without their willingness to take the measures recommended by international bodies in order to put the CPED provisions into practice, the international struggle to eradicate the crime of enforced disappearance runs the risk of failure. The hope that the present documentation will help make the Convention a reality for all persons everywhere in the world.

Professor Dr. Beate Rudolf
Director of the German Institute for Human Rights

Professor Dr. Markus Krajewski
University of Erlangen-Nuremberg

Rainer Huhle
Nuremberg Human Rights Centre





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1 Programme

CONFERENCE ON ENFORCED DISAPPEARANCES

PROGRAMME

10:00-10:30 · WELCOMING ADDRESSES

Michael Windfuhr (German Institute for Human Rights),
Rainer Huhle (Nuremberg Human Rights Centre),
Markus Krajewski (University of Erlangen-Nürnberg)

10:30-11:00

Emmanuel Decaux · Paris · Doctor of Law from the University Panthéon-Assas Paris II and "agrégé" of public law · Chairperson of the UN Committee on Enforced Disappearances
"Competences and Functioning of the Committee on Enforced Disappearances"

11:00-11:45 · DISCUSSION

11:45-12:00 · COFFEE BREAK

12:00-12:15

Hanns Schumacher · Geneva · Ambassador · Permanent Mission of the Federal Republic of Germany to the United Nations Office and other international organizations in Geneva
„Supporting the Convention for the Protection of all Persons from Enforced Disappearance: The German Contribution“

12:15-12:45 · DISCUSSION

12:45-13:30 · LUNCH BREAK

13:30-14:00

Nina Schniederjahn · Erlangen · Law School · University Erlangen-Nürnberg
„Jurisdiction of International Human Rights Courts on Enforced Disappearance“

14:00-14:30 · DISCUSSION

14:30-15:00

Gabriella Citroni · Milano · University of Milano-Bicocca · International Legal Advisor of the Latin American Federation of Associations of Relatives of Disappeared People (FEDEFAM)
"Interpretation of the Substantive Provisions of the Convention"

15:00-15:30 · DISCUSSION

15:30-15:45 · COFFEE BREAK

15:45-16:15

Maria Giovanna Bianchi · Geneva · Secretary of the UN Committee on Enforced Disappearances and former Secretary of the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID)
"Working Group' and 'Committee' on Enforced Disappearances: complementarity and differences"

25 April 2012 · 10:00-18:30

Landesvertretung Bremen

Hiroshimastraße 24

10785 Berlin

How to get there:

www.landesvertretung.bremen.de/sixcms/detail.php?gsid=bremen60.c.1390.de

The Conference is held in English
(no translation provided).

Registration for participation at the Conference is necessary:

Online Registration:
www.institut-fuer-menschenrechte.de/index.php?id=1814

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CONFERENCE ON ENFORCED DISAPPEARANCES

16:15–16:45 · DISCUSSION

16:45–17:00

Rainer Huhle · Nuremberg · Nuremberg Human Rights Centre · Member of the UN Committee on Enforced Disappearances
"Emergency Procedure and Individual Complaints under Articles 30 and 31 of the Convention"

17:00–17:30 · DISCUSSION

17:30–18:00

Leonie von Braun · Berlin · Prosecutor at the Regional High Court of Berlin and Chairperson of the Working Group against Impunity of Amnesty International Germany
"Implementation of the Convention in Germany"

18:00–18:30 · DISCUSSION

PUBLIC EVENT: EVENING PANEL DISCUSSION (GERMAN/ENGLISH TRANSLATION)

The Convention against Enforced Disappearance – A relevant Issue for Germany?

19:00–19:30 · KEYNOTE

Beate Rudolf · Director of the German Institute for Human Rights · Berlin
"The UN Disappearances Convention: Challenges for Domestic Law and Politics"

19:30–20:30 · PANELISTS

Emmanuel Decaux · Chairperson of the UN Committee on Enforced Disappearances · Paris

Wolfgang Kaleck · Attorney · Secretary General of the European Center for Constitutional and Human Rights (ECCHR) · Berlin

Beate Rudolf · Director of the German Institute for Human Rights · Berlin

Almut Wittling-Vogel · Representative of the Federal Government for Matters Relating to Human Rights, German Federal Ministry of Justice · Berlin

Chair: **Michael Windfuhr** · Deputy Director of the German Institute for Human Rights · Berlin

20:30 · RECEPTION

Wine and prezels

gefördert durch:



Auswärtiges Amt



Human Rights

Online Registration Evening Panel Discussion:
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Emmanuel Decaux

2 Competences and Functioning of the Committee on Enforced Disappearances

I am very honoured to participate in this important conference in Berlin – actually the first one and a very useful precedent – which is a privileged opportunity to foster the International Convention for the Protection of All Persons from Enforced Disappearance (CPED). I welcome the initiative of the organisers and especially the role of my dear colleague and friend, Rainer Huhle, member of the new Committee on Enforced Disappearances (CED). I want also to salute the pro-active contribution of the German Institute for Human Rights, a great partner in the European network of National Human Rights Institutions.

The mandate of the CED compels us. We are aware of the human tragedy that is the “phenomenon” of enforced disappearances, a crime of extreme seriousness, destroying victims by denying their mere existence and abolishing the rule of law. The purpose of the Convention is precisely to restore the law at the heart of the demand for justice and reparation through mechanisms of prevention and protection, early warning and monitoring, investigation and safeguards, with a new form of “*habeas corpus*”.

The Committee's mandate is the result of a long process. The first resolution of the UN General Assembly was adopted on 20 December, 1978, followed by the setting up of the Working Group on Enforced or Involuntary Disappearances (WGEID) by the Human Rights Commission two years later, in 1980. The Declaration on the Protection of All Persons from Enforced Disappearance was adopted by the General Assembly on 18 December, 1992, twenty years ago. Suffice it to say all the progress that was made led to a move from a “*prise de conscience*” to a declaratory statement, and from a soft law instrument to a full legal engagement. The Convention was adopted on 20 December, 2006, following intense negotiations and entered into force on 23 December, 2010.

Following that turning point, elections were held within six months, to designate the ten independent experts appointed to serve as members of the Committee on Enforced Disappearance. The experts are elected for a term of four years renewable once, but in a conventional manner half of the first mandates were reduced to two years to allow a gradual renewal of the Committee. In a more original way, article 27 of the Convention provides for an “evaluation of the functioning of the Committee” by the Conference of states parties, at a term of four to six years after the entry into force, which was a compromise during the negotiation, making possible all options. This means that the Committee will have to prove itself without delay, and its members are determined to do so.

Our first session was held in November 2011 and the second in March 2012. They were technical sessions, very short, about one week – four days and five days respectively – , but from the outset we wanted to make the Convention “operational”. Our next sessions, from the third one in November 2012, will last ten days, and in a first step we will allow concrete situations regarding the states parties. Two ten-day sessions are also scheduled in 2013, but we will probably have to anticipate an expansion of the sessions of the Committee to fulfill its various missions.

The Committee's mandate should also be considered in a perspective of space. The Convention has a universal dimension and is part of the “core instruments” put forward by the High Commissioner for Human Rights. Contrary to the Declaration of 1992, for which the Working Group on Enforced or Involuntary Disappearances is the caretaker and which involves all UN member states, the Convention of 2006 is binding only on states parties. It entered into force following the 20th ratification and currently consists of 32 states parties, with some sixty signatory states. Not all states

parties have accepted the voluntary mechanisms, such as the individual communications procedure under article 31 or the state communication procedure of article 32, which limits the practical scope of their commitment.

However, the objective is the universal and effective implementation of the Convention by all states. It will close the gap of protection for victims as the Rome Statute of the International Criminal Court deals only with repression of "widespread or systematic practice of enforced disappearance" as a crime against humanity. We need multi-level prevention and international cooperation, repression of the crime as such, justice and reparation. This is a worthy challenge responding to the responsibility of all stakeholders, to address the ordeal, the efforts and expectations of several generations.

In a sense, the Committee is just one link in a long chain of solidarity launched more than 30 years ago by a coalition of states and NGOs, which created diplomatic dynamics and a legal framework. We affirm our humility and our commitment, our eagerness and our dedication to fulfill our mandate. During the first session of the Committee, its new members undertook the solemn commitment to exercise their duties and responsibilities in full conscience, independence and with impartiality. However, impartiality is neither indifference nor neutrality. In cooperation with all states parties, our protection mandate has to be "victim-oriented" in the words used by the Human Rights Council about the complaint procedure.

Our mission is to implement the potentialities of the Convention, its technical innovations as well as its constructive compromises, to make it a major tool for the protection and promotion of human rights. In this respect, we are at a turning point in the functioning of the Committee.

I Standard-setting of the Procedures of the Committee

Firstly, the Committee has to develop its working tools. It has to determine its organs, with the appointment of a chairman and a bureau, for two years. The size of the Committee facilitates a collegial spirit and a close consultation. The involvement of each member in the

collective work should be noted, with shared responsibilities for preparing non-papers and documents. A key link was also the appointment, on the eve of the second session, of the secretary of the Committee – a United Nations official uniquely qualified for this position – who completed our team and multiplied our capacity to work.

I will not insist on these practical elements, but they are crucial to allow fruitful exchanges in a multicultural context, between the very different personalities that do not know each other, do not speak the same languages, who come from around the world with contrasting historical experiences, and who are required to work all together for a common ideal. This implies not only a complete involvement during the brief sessions, but a continuous and heavy workload between the sessions, using the Internet. The Committee is not a sinecure; it requires a substantive commitment from all its members.

1. The first task of the Committee was to adopt provisional rules of procedure in order to work transparently from the first session. This regulation was written in English and was revised during the second session. Its different language versions are being translated. If a technical basis was prepared by the Secretariat, it was still necessary to adapt it to the requirements and specificities of the Convention, leaving some flexibility for later adjustments in the light of practical experience or review of the stakeholders. We now have our rules of procedure and the Committee is fully operational, "*en ordre de marche*".

2. At another technical level, the second session was dedicated to the declination of the rules of procedure in practical tools, to guide the implementation of the Convention. This was the case for three or four documents due to be posted on the Committee website as soon as possible:

– The guidelines¹ regarding the submission of state reports under article 29 of the Convention were written with practical consideration. This was to facilitate the work of states parties that shall, within two years after the entry into force, present the measures taken to give effect to their obligations. This shall also lead to a systematic approach of the Convention, although the states may find themselves in very different situations.

1 Guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention, adopted by the Committee at its second session (26–30 March 2012) : http://www.ohchr.org/Documents/HRBodies/CED/CEDGuidelines_en.pdf

The Convention does not explicitly provide periodic reports with specific deadlines, but leaves the door open for more flexible monitoring, with the examination of "additional information on the implementation of the Convention". The implementation of this first reporting cycle on time becomes even more important, so that an effort of rationalisation was initiated by the High Commissioner with the Dublin II process², to which the Committee is party since its last session, following the accession made personally by its president following the first session.

- The form for individual communications on the basis of article 31 was based on the precedents used by other treaty bodies. A detailed notice must enable the applicant to submit all relevant information for the Committee to effectively decide on the admissibility criteria and refer the file to the state concerned before consideration of the substance, according to a contradictory procedure which remains in writing.³

The Committee is particularly attached to the guarantees of confidentiality, in the very specific context of enforced disappearances, as well as to the interim measures and measures of protection for complainants, families and witnesses. The dispatching of cases between the Committee and other individual communication procedures is a key issue for the future of this mechanism. Depending on the volume of cases, the Committee may set up special bodies, working groups or rapporteurs outside of its plenary meetings.

- It will also be necessary, at least formally, to develop *mutatis mutandis* a form for the state communications under article 32.

- The simplified form for a request for urgent action under article 30 has been a priority because of the originality of this procedure which concerns all states parties. Much attention has been paid to the notion of "legitimate interest" to seize the Committee and on the delays in responsiveness that such a procedure implies.⁴ The Committee appointed a rapporteur among its members, an assistant rapporteur and an alternate, to be able to respond promptly to any request for urgent action.

The admissibility conditions are the absence of a parallel application „being examined under another procedure before an international investigation or settlement of a same nature". Taking into account the unique nature of the competence of the CED, with its capacity to "request that the state party should adopt all the necessary measures, including interim measures", there is room for further interpretation. However, the applicants shall be fully informed of the different options offered by the Working Group and the Committee, to choose *via electa* with full knowledge of the possibilities.

3. At a third level, it is imperative to translate these technical documents into communication tools. This involves the publication by the High Commissioner of a new revised fact-sheet on *Enforced or Involuntary Disappearances* (n°6/rev.3)⁵, taking into account the entry into force of the Convention and the establishment of the Committee.

This implies above all more user-friendly access to the United Nations website, and to make clear and show simply to the general public the alternative procedures available: On the one hand the system of "individual petitions", for which the remedies of the Human Rights Committee or of the Committee against Torture, and of the Committee on Enforced Disappearances shall be articulated; on the other hand the system of urgent appeals in which the respective responsibilities of the Working Group on Enforced or Involuntary Disappearances and those of the Committee on Enforced Disappearances shall be distinguished.

This will guarantee the effective access of the victims to the new procedures implemented. The Convention promotes formation and training for "law enforcement personnel, civil or military, medical personnel, public officials, etc" (article 23) and encourages the action of NGOs, but the treaty is a complex and sophisticated instrument which requires important efforts of communication and the awareness of the OHCHR, as well as states parties.

2 "Dublin II process" denotes the treaty body strengthening process, see <http://www2.ohchr.org/english/>. See also the statement of the CED on Treaty Body Strengthening of 7 November 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12780&LangID=E>

3 Guidance for Submissions of Communications to the CED available at <http://www.ohchr.org/Documents/HRBodies/CED/Art31ModelComplaintsForm.doc>

4 Guidance and Model for the request for an urgent action by the CED available at http://www.ohchr.org/Documents/HRBodies/CED/ModelUrgentRequest_en.doc

5 <http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf>

II Consultation of the Committee with the Stakeholders

Since its early sessions the Committee has shown its will to carry out a consultation with all stakeholders, starting with the states, but also with NGOs and associations of victims.

1. A strategy of ratification is needed for the signatory states as well as for the third states. An international conference in Paris on May 15, 2012, sponsored by France and Argentina, restarted this dynamic by mobilising all the states "friends of the Convention" and the coalition of NGOs. This is a priority to reach a critical mass quickly so as to give the Convention full effect.

This concerns all states and all continents. It would be an error for the old democracies to consider that enforced disappearances take place only under "dictatorship". Citizens of old democracies can become victims of enforced disappearance in third countries, and persons under their domestic jurisdiction can become victims with or without the complicity of state agents. The fight against terrorism was a recent illustration of the risk of a legal no man's land, a "zone de non-droit", in the heart of Europe, with the "spider's web" of clandestine transfers and secret detentions, described in 2006 by senator Dick Marty in his report to the Parliamentary Assembly of the Council of Europe (Report n°10957). The Convention is not only a moral pulpit for leading by example, it is also a practical risk-assurance for democracies.

The commitment of all is necessary for an effective international cooperation in a universal context. In this respect the recent Recommendation 1868 and Resolution 1995 adopted in March 9, 2012 by the Standing Committee of the Council of Europe Parliamentary Assembly (PACE), following a report of MP Pourgourides (Report n°12880), to "consider launching the process of drawing up a European convention for the protection of all persons from enforced disappearance, based on the achievements of the UN Convention" (res. para. 9.3) seems irrelevant, I'm sorry to have to say it so bluntly, but this initiative, launched by some members of Parliament with a narrow agenda and without proper consultation is doomed from the start because of obvious contradictions between member states of the Council of Europe.

It risks meanwhile creating a diversion and demobilising the necessary efforts in a broader international

context, whereas "The Assembly reiterates its support for the United Nations International Convention for the Protection of all Persons from Enforced Disappearances and invites the Committee of Ministers to urge all the Council of Europe member states which have not yet done so to sign, ratify and implement this convention" (rec. para. 2).

However, this welcomed priority is undermined when "the Assembly nevertheless recalls that the United Nations Convention notably: 3.1. fails to fully include in the definition of enforced disappearances the responsibility of non-state actors; 3.2. remains silent on the need to establish a subjective element (intent) as part of the crime of enforced disappearance; 3.3. refrains from placing limits on amnesties or jurisdictional and other immunities; 3.4. severely limits the temporal jurisdiction of the Committee on Enforced Disappearances" (rec. para. 3). At the very least, a moratorium to assess the scope and effectiveness of the UN Convention would be necessary before criticising the assessment of the Working Group or to list the so-called weaknesses of the new instrument, "recognising that the UN Convention is necessarily a compromise"! It is neither the time nor the place to argue with these innuendos, but the interpretation and implementation of the Convention by the Committee will be equal to the occasion without watering down international obligations. The Committee sticks to the "objective" elements of the definition of the crime in the Declaration and in the Convention. It would look closely at the opportunity and feasibility to take into account the "responsibility of non-state actors" within the legal parameters of articles 3 and 4, but also of articles 24 and 25, for example, keeping in mind the primary responsibility of states, in accordance with Public International Law. The first general debate of the Committee, during its third session in November 2012, will deal with the issue of "state responsibility and the role of non-state actors".

It would be more urgent to facilitate the implementation of the Convention, at a domestic level or at a European level, by developing a model law if not, at least "good practices" adapted to different legal systems to take into account the many obligations of the states parties, not only in criminal but also in civil matters. Thus, the bill of adaptation recently introduced by the French Government in the Senate (Sénat, Pj. N° 250, 2011-2012) is a first step towards articulating the obligations of the Rome Statute and of the Convention. As the Prime Minister said in the explanatory memorandum ("*exposé des motifs*"):

"Contrairement aux décisions-cadres et à la décision Eurojust, la Convention sur les disparitions forcées n'offre aucune « option » aux Etats qui sont parties à cette convention. Les Etats qui ont ratifié la Convention ont l'obligation d'incriminer les disparitions forcées. C'est ainsi que l'article 6 du projet de loi intègre en droit français la définition des disparitions forcées d'une manière strictement conforme aux obligations résultant de la Convention et tire toutes les conséquences prévues par la Convention (délai de prescription de l'action publique et de la peine adapté à la gravité des faits, introduction d'une clause de compétence universelle, rédaction plus large de la clause *aut dedere, aut judicare*)" (Pj n 250, p.28).⁶

This effort of information on, and awareness of the legal framework of the Convention is all the more necessary as it is a complex instrument that requires a practical translation for the states concerned. Regional efforts, first of all, for European countries, within the European Union, the Council of Europe or – why not? – the OSCE, for example, would be very helpful. But the same efforts should be endeavored for Africa, America, and Asia, and within the Commonwealth and the Francophonie, etc. The next cycle of the Universal Periodic Review (UPR) will constitute a great opportunity for friends of the Convention to advocate for signature and ratification of the treaty, but they ought also to use all ways and means to facilitate action-oriented cooperation in practical terms.

2. The broad consultation also concerns NGOs and associations of victims. The Committee participated in its first session in a side event organised by the coalition of associations of families of missing persons and has always been ready to listen to NGOs such as Amnesty International, which in 2011 published a useful "checklist for effective implementation of the Convention", under the title *No impunity for Enforced Disappearances*, 2011.

The Committee wishes to develop exchanges and to practice more openness with regard to these key partners and transparency compatible with all requirements of confidentiality. The Committee recognises that grassroots NGOs are sources of firsthand information, as well as National Human Rights Institutions.

It will consider the practicalities of the presentation of alternative or shadow reports under article 29, but also of *amicus curiae* for its quasi-litigation procedures, such as article 31.

A new field to explore is the various "information" that will allow the Committee to implement the unparalleled competences under articles 33 and 34. Article 33 provides for the possibility of a field mission when "the Committee is informed by reliable information that a state party is seriously violating the provisions of the Convention" and article 34 provides an additional step with the possibility of "bringing the matter on an urgent basis to the attention of the UN General Assembly". The articulation between the different competences of the Committee shall be specified, by defining different parameters and objective criteria even before a crisis arises, but obviously the quality of information provided by NGOs will be a key element in the proper functioning of these new provisions.

3. Article 28 of the Convention emphasises the cooperation with all international institutions and organisations. This is particularly the case of UNHCR, ICRC or UNICEF, with whom initial contact has been established. It will be the same with the other treaty bodies, particularly in the context of the inter-committee coordination and the monitoring of Dublin II, to streamline processes and procedures while safeguarding the innovations that make up the added value of the Convention on Enforced Disappearances.

However, clearly the natural partner of the Committee is the Working Group on Enforced or Involuntary Disappearances. The first official meeting, bringing together the fifteen experts, was held in November 2011 with the publication of a press release confirming the principle of annual meetings. At another level, the resolution of the General Assembly on enforced disappearances calls on the chairperson of the Committee and the Chair-Rapporteur of the WGEID to come to New York to present their activity reports. Both bodies have reiterated that their roles are complementary, the Committee acting within the scope of the Convention over which it is the guardian, on the basis of legal obligations assumed by states parties for the future, while the competence of the Working Group concerns all member states, in a humanitarian context

6 "In contrast to the framework decisions and Eurojust decision, the Convention on Enforced Disappearances does not offer any 'options' to its states parties. The states having ratified the Convention are under the obligation to criminalise enforced disappearances. For this reason, article 6 of the draft law introduces into French law the definition of enforced disappearances in strict conformity with the obligations deriving from the Convention, and it draws all conclusions required by the Convention (statute of limitations for public prosecution and a sanction commensurate with the gravity of the facts, introduction of a clause on universal jurisdiction, and the largest possible formulation of the clause *aut dedere, aut judicare*)." (translation by the editor).

reinforced by the Declaration of 1992. But beyond these technical differences the two bodies share responsibility for legal consistency in defining the very concept of "enforced disappearances" and the effective implementation of various procedures, which involves close consultation, whether regarding general observations being developed by the Working Group or its program of visits.

For its part, the Committee intends to focus on practical experience, with an operational interpretation of the autonomous concepts of the Convention, when examining reports and communications, before undertaking the drafting of general comments. At this stage, the Committee has launched several of its own reflections on women and children as vulnerable groups, but also on the issue of non-state actors. In light of the elliptical provisions of article 4, it wants to deepen its reflection on "the responsibility of the state and the role of non-state actors" by organising a first day of general discussion on this topic during its third session in November 2012.

III Implementation of the Procedures of the Committee

It would be necessary to write a third part of this presentation on the implementation of the competences of the Committee, but this would be premature. The Committee has been in existence for less than one year. It is very vigilant when it comes to crisis situations which could result in a rapid alert, because things change quickly. Just think about the chaotic situation in Mali, one of the first states parties. But for now its role has been to set up tools and to deal with procedural issues, sometimes legal niceties, even if the stakes were essential.

It is now necessary that states parties present their first reports, "within two years" of the entry into force

of the Convention on December 23, 2010; a delay on their part would be inexcusable. In a letter to states, in my capacity of chairman of the CED, I welcomed their cooperation and reminded them of this time frame. I hope that the first reports will be discussed at the November session, even if technical delays in translation and editing involve a shift of 12 weeks. In any case, the two sessions of 2013 will mark a first appointment for each the states parties to make a public assessment of their commitments, a "*bilan de santé*", a sort of check up.

The Convention provides an all-risks insurance for the future, with a range of means of prevention, monitoring and rapid alert. It offers a series of practices, guarantees and political principles with regard to truth, justice and reparation. It fills a gap by listing measures of protection and cooperation, domestically and internationally, while paving the way for a specific criminal offense, including the possibility of qualification as a crime against humanity. The Convention is at the crossroads of the international law of human rights and international criminal law, constituting a unique and irreplaceable instrument. As the crime of enforced disappearance constitutes a denial of the victim, through the denial of the "protection of the law", the answer which shall be given is the affirmation of the law, with a continuous vigilance against any breaches.

Each of us has the common responsibility to give full regard to the Convention. We have no time to wait and see; we are eager to build a momentum for universal ratification and effective implementation. According to the compelling wisdom of Hillel the Elder: "*If I'm not for myself, who will be for me? And when I'm for myself, who am I? And if not now, when?*" The entry into force of the Convention is a new start, but not another story...

The author is chairperson of the Committee on Enforced Disappearances.

Hanns H. Schumacher

3

"Supporting the Convention for the Protection of all Persons from Enforced Disappearance: The German Contribution"

Ladies and Gentlemen,

Please allow me first of all to express my gratitude to the German Institute for Human Rights for inviting me to this conference. I regret not having been able to be here from the start this morning due to earlier commitments – with other organisations of civil society, to emphasise.

I am especially pleased to meet here in Berlin for the first time Mr. Decaux as chairperson of the Committee on Enforced Disappearances (CED) and Mr. Huhle as the German member of the Committee. I sincerely regret, Mr. Huhle, that our schedules in Geneva were not compatible, when the Committee met there in March. But, it goes without saying: our mission in Geneva has followed and supported the work of the committee from the start.

Let me use this opportunity to wish you well for your work in the committee and success for the committee as a whole. I see with respect that you both are actively honoring a promise which you gave at the inaugural meeting of the CED last year: to ensure that the Committee meets closely with NGOs! Dialogue with the civil society is vital.

Enforced disappearances remain one of the most pressing human rights issues, one of the worst violations of human rights and "one of the most heinous crimes", as the High Commissioner for Human Rights, Navi Pillay, put it, when she opened the second session of the Committee on Enforced Disappearances in Geneva a month ago, the 26 March 2012.

Victims are put in terrible situations of helplessness and vulnerability, with no access to medical help or legal support. The risk that victims of enforced disappearances become also victims of torture, sexual violence or other inhuman treatment is very high; in many cases victims are even killed.

Families and friends are left behind in despair without the possibility to support the victims. Not knowing whether someone you love is alive or dead, is probably one of the heaviest burdens to bear.

This marks our targets to achieve:

- to make the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) an efficient instrument and
- to give to the Committee established in Geneva last year all means necessary to do its job. The latter is easier said than done. We all know about the efforts of the OHCHR to strengthen the treaty bodies.

Ms. Pillay was very clear on the present limitations at the meeting in March. States have to meet their responsibilities!

I would like to commend the efforts of all those partners who have advocated the creation of the CPED for a long time: France, Latin American and other partners.

The German Federal Government has participated actively and has constructively supported the negotiations on the Convention. I am proud that we are among the first countries to have ratified the Convention. Germany has also been a member of the Group of friends and has carried out joint demarches in support of the ratification process in various capitals along with partner countries.

I feel that the support the Federal Government has lent to Mr. Huhle's candidature is also a symbol of the high importance we attach to a successful work of this young body.

That brings me to the question what the German government can do today to support the fight against enforced disappearances and the work of the Committee. I see three priorities:

The first priority is the ratification process. The Convention came into force very recently and of course has a limited number of state parties so far (32 ratifications/91 signatories). It is still far from being applicable in a majority of countries. So we should spare no effort, when it comes to promoting universal acceptance. Germany stands ready to address this issue wherever we can. In Geneva we can do so by using our statements in the Universal Periodic Review. And we can also use various bilateral contacts.

I would be glad to learn from you in our following discussion if there are specific countries we should especially focus on, i.e. those who are close to ratification but have not taken a final decision or those where the ratification process might have got stuck.

The second priority, in my eyes, is the full and complete applicability of the Convention, which includes the declaration recognising the competence of the Committee to receive complaints from individuals and states under articles 31 and 32. The Federal Government had, in the first place, expressed that it would consider this declaration once the Convention has entered into force. I am happy that this process is now on its way and that we will have done our homework very shortly.

Thirdly and in more general terms, Germany should continue to speak out very clearly against the terrible practice of enforced disappearances wherever it might occur and to all states without regard to the quality of our relations in general. One can have a close and constructive partnership with a country and still address enforced disappearances. This also applies when allegations were raised that in the context of the fight against terror, renditions or enforced disappearances had been carried out via German territory. The German Government had never actively participated in, or approved of, such action. Moreover the German government campaigned on behalf of persons under arrest within bilateral dialogues with relevant states including contacts with the US government at the highest political level.

A victim-centred approach on enforced disappearances is crucial. In the UN context in Geneva, we there-

fore have to always consider how to reach out of the "bubble" of the Palais des Nations and Palais Wilson, to address needs of victims as concretely as possible. The Convention offers the unique instrument of the urgent procedure to search for victims. Let us make this efficient and useful!

As states we should use all our means to prevent enforced disappearances, to protect victims and potential victims and to raise general awareness.

Prevention and protection can consist in an attentive attitude towards groups of persons at risk, such as human rights defenders or journalists. German embassies throughout the world are instructed to stay in close contact with human rights defenders and to remain accessible for them. In many cases, a regular contact with diplomatic missions of Western countries might already offer some protection. This obviously highly depends on the specific circumstances in given countries.

One example are the cases of human rights defenders from Sri Lanka who had travelled to Geneva during the March session of the Human Rights Council and during that time became subjects to hate campaigns in the national media back home and even felt pressure from the official delegation in Geneva. Many of them were afraid about reprisals when travelling home. The German embassy, along with other missions of EU member countries, established a close contact to many human rights defenders and even picked up some of them at the airport.

I would like to conclude with some remarks on the work of CED:

1. We appreciate CED reaching out to member states and having organised exchange with state parties in the first meetings. This is a good way of keeping states informed and involved.
2. We also appreciate the effort of coordination the Committee has undertaken with the Human Rights Councils Working Group on Enforced or Involuntary Disappearances (WGEID). What might be seen as doubling of structures at first glance, can be very useful, when sharing work according to the specific added value of each body, the Committee efficiently using its instruments towards state parties and the Working Group focusing on countries and situations not covered by the Convention.

3. I should also like to refer again to the words of the High Commissioner, opening the second session of CED: by establishing its working methods, the Committee can set standards, taking into account the efforts the High Commissioner has made to strengthen the treaty body system as a whole. A good coordination with other treaty bodies and a comprehensive reporting calendar makes it easier for state parties to fulfill their reporting duties and thus to seriously work on the matter.

Finally, allow me to appeal to members of the Committee and everyone else involved: Let us make this new instrument work! This will require endurance and creativity. I am far from alleging that the entry into force of the Convention and the establishment of CED are already an effective firewall against enforced disappearances.

I am looking forward to your comments and would be grateful if we could use our exchange to further re-

flect on how a country like Germany can further contribute to the fight against enforced disappearances and especially on expectations you might have towards our mission and which I could take back to Geneva.

In general, I can only reiterate that I would like not only to stay in touch, but to strengthen, if possible, the exchange with civil society on all matters pertaining to the responsibilities of the HRC and the OHCHR. I respect and acknowledge that NGO's very often have a clearer, most distinct, sometimes extreme view on particular human rights situations. This can clash with state actions in human rights bodies, which are reflecting and have to reflect political realities and limitations to act. But in the end, we are all fighting for the same cause!

Thank you very much for your attention.

The author is head of the German Permanent Mission of the Office of the United Nations in Geneva.

Nina Schniederjahn

4

Procedural Hurdles in the Jurisdiction of International Human Rights Courts on Enforced Disappearance

The International human rights courts play an important role in the international fight against enforced disappearance. Whilst it took until 2010 to adopt the International Convention for the Protection of All Persons from Enforced Disappearance, the first binding decision by an international court was rendered over 20 years earlier. In 1988 the Inter-American Court on Human Rights (IACHR) delivered its first decision ever on an enforced disappearance case.¹ Beginning in the 1990s the European Court on Human Rights (ECHR) was confronted with numerous cases originating from Turkey and Russia.² Notwithstanding the fact that neither the American Convention of Human Rights nor the European Convention of Human Rights include an explicit right not to be subjected to enforced disappearance, the courts considered enforced disappearance as a "multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee."³ The courts found violations of the right to liberty, the right to humane treatment, the right to life, the right to a fair trial and the right to judicial protection.

Not only can the case law of these two supervisory bodies aid the Committee on Enforced Disappearance in interpreting and implementing the Convention, but also the courts are the most effective remedy available to victims of this crime. Nevertheless, victims applying to the human rights courts may have to face several procedural hurdles, partly because of the procedural particularities in cases of enforced disappearance. One big difference to many other violations heard by the courts is that the victim himself is almost always not able to apply to the courts. Normally close relatives have litigated on their behalf and have

claimed that they are also victims of enforced disappearance. Due to the continuity of cases, the applicants are furthermore subjected to greater pressure. Since the fate and the whereabouts of the victims are often not established, the families hope that the disappeared person is still alive makes them vulnerable to threats by the government. The clandestine operation of enforced disappearance leads to an increased effort by the courts and the applicants to produce evidence to prove what happened to a person after they disappeared.

This essay seeks to illustrate difficulties applicants in enforced disappearance cases could be faced with at the Inter-American Court of Human Rights and the European Court of Human Rights and compares the effectiveness of those two important judicial bodies.

I. Compliance of the Commission with the procedural norms in the Convention

Similar to the European System before the introduction of the 11th Additional Protocol in 1998, the Inter-American System is two-tiered with a Commission and a Court of Human Rights. After the Commission has dealt with a complaint and its recommendations have not been complied with, it shall refer the case to the Court.⁴ Art. 48 and 51 of the American Convention set forth the steps that the Commission must employ when dealing with a complaint. This section embodies rules about a formal declaration of admissibility, a prior hearing or on-site investigations by the Commission. A question which the Court was confronted with, especially in the beginning of its work, was what the

1 Velásquez-Rodríguez v. Honduras, IACHR, Merits, 29. July, 1988.

2 Kurt v. Turkey, ECHR, 25. May 1998; Bazorkina v. Russia, ECHR 27. July 2006.

3 Velásquez-Rodríguez v. Honduras, IACHR, Merits, 29. July, 1988, para. 155, 158; Blake v. Guatemala, IACHR, Merits, 24. January 1998, para. 65, 66; Bámaca-Velásquez v. Guatemala, IACHR, Merits, 25. November 200, para. 128.

4 Art. 45 Rules of Procedure of the Inter-American Commission on Human Rights.

consequences of a procedural oversight are. States used any failure of the Commission to follow the procedure mandated by the Convention to provoke a preliminary objection.⁵ In its first decision the Court decided that:

"a failure to observe certain formalities is not necessarily relevant when dealing on the international plane. What is essential is that the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced, and that the objectives of the different procedures be met."⁶

The court hereby demonstrates that it promotes substance over form. A line is drawn however if the State's procedural rights are diminished or its ability to present a defense is hampered. Otherwise, the credibility and authority of the Court would be at risk.⁷ This broadminded understanding of the procedural duties of the Court was fueled by the frustration that no contentious case was referred to the Court by the Commission, but also because of the importance of disappearance in Latin America.⁸

Another question the IACHR had to decide was whether it may review the Commission's admissibility decision. The Commission is of the view that the Court is limited in examining its decisions on admissibility since it is not an appellate body. In *Velásquez-Rodríguez* the IACHR nevertheless decided that the Court has full jurisdiction over all issues relevant to a case and may review all matters involved, which derives from its character as the sole judicial organ in matters concerning the Convention.⁹ This broad jurisdiction is similar to the power the ECHR had to reexamine the European Commission's decisions in the European system prior to 1998. This however leads to an imbalance between the parties in favor of the respondent government. Especially cases of disappearance have shown that witnesses have a higher risk of being tortured or killed. The first cases decided by the Inter-American Court, the so-called Honduras cases,¹⁰ lead to the assassination of three witnesses.¹¹ A second ex-

amination of the State's preliminary objection leads to more uncertainty for the victims and witnesses whether their case will ever be discussed on the merits. Witnesses are more likely to be unwilling to testify.

II. Exhaustion of domestic remedies

The preliminary objection most often invoked by the states is that the applicant had not exhausted domestic remedies. The domestic remedies provided by the States must be adequate and effective. In cases of forced disappearance habeas corpus is the adequate means to locate a missing person presumably detained by the authorities. Often victims have brought numerous unsuccessful writs of habeas corpus. Honduras for example required from the applicant that he name the place of detention and the authority under which the person was allegedly detained. The obvious fact that knowledge of the whereabouts of a disappeared person as the main subject of the inquiry is made a requirement for this inquiry itself renders such a means of domestic remedies absurd and unreasonable.¹² Furthermore, habeas corpus is not effective if it is not applied impartially by the government or if the party invoking it is placed in danger as a result. Regarding Honduras the court held that:

"there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities."¹³

Ineffectiveness of the authorities and the attempt to hinder the search for a disappeared with all possible means is inherent in a systematic practice of forced disappearance.

5 *Velásquez-Rodríguez v. Honduras*, IACHR, Preliminary Objection, 26. June 1987, para.25; *Durand and Ugarte v. Peru*, IACHR, Preliminary Objection, 28. May 1999, para. 29.

6 *Velásquez-Rodríguez v. Honduras*, IACtHR, Preliminary Objection, 26. June 1987, para.33.

7 *Cayara v. Peru*, IACHR, Preliminary Objection, 3. February 1993, para. 63.

8 Burgenthal, CHRGJ Working Paper, p. 11.

9 *Velásquez-Rodríguez v. Honduras*, IACtHR, Preliminary Objection, 26. June 1987, para.33.

10 The Honduras cases consisted of the first three cases ever decided by the IACHR *Velásquez-Rodríguez*, *Fairén-Garbi* and *Solis-Corales*, *Godínez-Cruz*.

11 *Velásquez-Rodríguez v. Honduras*, IACHR, Merits, 29. July 1988, para. 40 et seq.

12 *Velásquez-Rodríguez v. Honduras*, IACHR, Merits, 29. July 1988, para. 64 et seq.

13 *Velásquez-Rodríguez v. Honduras*, IACHR, Merits, 29. July 1988, para. 80.

The European Court of Human Rights came to a similar conclusion. Applicants are not obligated to recourse to remedies which are inadequate or ineffective. The Court questioned the prospect of success of a complaint regarding enforced disappearance to the domestic authorities, especially if all responsibility is denied and proof of the circumstances of the case is lacking.¹⁴ In the cases concerning Turkey as well as Russia, the Court held, that the authorities failed to carry out an effective criminal investigation into the circumstances surrounding the disappearances. In many cases investigations or criminal actions were pending for years.¹⁵ Therefore, the applicant is only requested to do everything that can be reasonably expected of him to exhaust the domestic remedies available.¹⁶

States when confronted with enforced disappearance cases almost always invoke the non-exhaustion of domestic remedies. The courts however consider the ineffectiveness of domestic remedies as an integral part of the systematic practice of enforced disappearance and reject this preliminary objection.

III. Friendly settlement

States have also objected that the Inter-American Commission did not attempt to promote a friendly settlement between the petitioner and the State. Art. 48 I lit. f. American Convention provides that the Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement. In *Velásquez Rodríguez Honduras* argued that the attempt at reaching a friendly settlement is obligatory otherwise the application to the Inter-American Court is inadmissible. During the proceedings at the Commission, Honduras not only denied responsibility for the disappearance of *Velásquez Rodríguez* but also rejected any cooperation with the Commission. The impossibility to reach a friendly settlement in such cases was also reflected in the decision of the case:

"when the forced disappearance of a person at the hands of a State's authorities is reported and that State denies that such acts have taken place, it is very difficult to reach a friendly settlement that

will reflect respect for the rights to life, to humane treatment and to personal liberty".¹⁷

In *Caballero-Delgado and Santana* on the other hand, the Colombian government admitted that it was possible that State agents participated in the disappearance. The Court emphasised that omitting to attempt to mediate between the parties is only a possibility in exceptional cases. The simple fact that a case concerns enforced disappearance is not sufficient to forego an attempt to reach a friendly settlement.¹⁸

IV. Participation of victims in the proceedings

Mostly victims who are willing to bring their case to the international level want to participate in the proceedings as much as possible. Participation can also have an important psychological effect on those victims who still don't know what has happened to their relatives and request answers from the State. In the Inter-American system victims have only limited possibilities to participate, but some procedural advances were achieved in the last years. According to Art. 44 American Convention all persons and NGOs are able to file a complaint with the Commission. It is not required that the applicant is a subject of the violation. This empowers NGOs to bring a case of enforced disappearance to the Commission even if the disappeared person has no family or the next of kin are afraid to complain because state agents are threatening them. In contrast, individuals do not have standing to bring a case before the IACHR; only the Commission may forward a case to the Court. In the early years victims had no rights to participate in the proceedings. Under the impression of the first contentious cases, the Court and the Commission gradually changed their Rules of Procedure to provide the petitioner with greater autonomy. Changes in the 2003 Rules of Procedure of the Court granted the victims the right to submit requests and evidence to the Court.¹⁹ A legal assistance fund for victims who lack sufficient means to cover the cost of a petition before the Commission or the litigation before the Court was installed in 2010.²⁰ Besides these improvements to the victim's rights, they

14 *Askharova v. Russia*, ECHR, 4. December 2008, para. 55.

15 *Kurt v. Turkey*, EGMR, 25. May 1998, para. 83; *Bazorkina v. Russia*, EGMR, 27. July 2006, para. 120 et seq.

16 *Kurt v. Turkey*, EGMR, 25. May 1998, para. 83; *Cakici v. Turkey*, EGMR, 8. July 1999, para. 80.

17 *Velásquez Rodríguez v. Honduras*, IACHR, Preliminary Objections, 26. Juni 1987, para. 46.

18 *Caballero-Delgado and Santana v. Columbia*, IAGMR, Preliminary Objection, 21. January 1994, para. 22 et seq.

19 Art. 25 I Rules of Procedure of the Inter-American Court of Human Rights.

20 Rules for the Operation of the Victim's Legal Assistance Fund of the Inter-American Court of Human Rights.

are still dependent on the Commission. To have more influence on the development of the cases, victim's representatives engaged to cooperate with the Commission. The Honduras disappearance cases demonstrated that a productive cooperation between the Committee and the attorneys is possible. The lawyers provided technical assistance for the Commission and they produced a joint document concerning the preliminary objections. Some of the petitioner's representatives were officially appointed as the Commission's ad hoc advisers to the case.²¹ Even though the attorneys of the victims perceived the cooperation as very productive, controversies concerning the legal strategy and the extent of the request arose.²² Especially regarding the production of evidence, the involvement of the victim's lawyers is of great advantage. Their knowledge of the case and contact to victims and witnesses promotes the elucidation of the circumstances of the case. Due to personnel and financial restraints on the Commission, the lawyers working for the victims are often more able and willing to produce evidence. In the Honduras cases two lawyers spent several months in Honduras to investigate similar cases of disappearance to prove the systematic nature of the crime and find witnesses willing to testify at the Court.²³ This indicates the importance that the participation of victims and their lawyers at the proceedings has.

At the European Court of Human Rights victims have the possibility to directly participate in the proceedings. Before 1982, when direct victim participation was introduced, it was also usual practice to appoint victims' lawyers as ad hoc advisers of the Commission. Since 1998 any person, NGO or group of individuals, can directly apply to the Court. The possibility to turn to the Court without the need to involve the Commission first resulted in the ECHR deciding many more cases of enforced disappearance than the IACHR. Up until now the European Court has been confronted with over 100 cases while the Inter-American Court has decided little more than 50 cases, although the number of incidents in Europe is low compared to the dimensions in Latin America. Victims should have direct access to the Inter-American Court to assure that

every family member of a disappeared person can bring his case before the Court.

V. Protection of the victims and witnesses

The protection of victims and witnesses during court proceedings is of utmost importance. The participants in enforced disappearance cases are often confronted with threats and violence because of their involvement in the proceedings. During the Honduras cases witnesses received death threats. The President of the Court hence sent a message to the government of Honduras requesting special protection for the witnesses and an investigation into the threats. However, not long afterwards three witnesses were assassinated which led to a special hearing on the matter. An interim measure issued requested Honduras to protect the witnesses and ordered information about the murder. The government agents provided very few data,²⁴ but the Court was also not eager to clarify these killings: An *amicus curiae* brief by a NGO to the Court asking it to renew its demands for investigation was ignored.

In the following years, the protection of witnesses was expanded. In the case *Blake v. Guatemala* the Court saw the necessity to include the family of a witness in the protection. Provisional measures ordered Guatemala to adopt any action necessary to effectively protect the safety of the witness and his family. It was furthermore requested for the State to assure that the family could reside in their homes without being persecuted or threatened by agents of the Guatemalan State or other persons acting with the acquiescence of the State.²⁵ These protective measures were even upheld after the case was resolved. A request by the Guatemalan State to terminate the provisional measures was not acceded. Several persons who had allegedly participated in the criminal act against Blake had not been investigated or arrested. Hence, the Court decided to continue the provisional measures but to require the government to report on the measures only every six months instead of every two.²⁶

21 Méndez/Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 *Hamline Law Review*, p. 534.

22 Grossmann, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 *Hastings International and Comparative Law Review*, p. 381.

23 Méndez/Vivanco, 13 *Hamline Law Review*, p. 534.

24 *Velásquez-Rodríguez v. Honduras*, IACHR, Merits, 29. July 1988, para. 39 et seq.

25 *Blake v. Guatemala*, Provisional Measures, 16. August 1995, para. 1ff.

26 *Blake v. Guatemala*, 18. August 2000, para. 1ff.

In the Kurt case before the European Court of Human Rights, the applicant and her attorney have been subjected to threats by the authorities due to her decision to lodge an application with the Commission. The applicant was pressured by state agents to withdraw her application to the Commission. Against the lawyer of the applicant steps were taken to prosecute him for his involvement in the application.²⁷ Interim measures were not adopted by the ECHR because the personal safety of the applicant and her lawyer was not at risk. The Court however found there had been a violation of Art. 34 European Convention, which protects the right to individual petition.²⁸ The Court recalled that

"it is of the utmost importance for the effective operation of the system of individual petition ... that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints."²⁹

An effective protection system for the participants of the proceedings is not only important for the safety of those involved but is also indispensable to persuade witnesses to come forward. This is of even greater importance in cases of enforced disappearance where proof is rare and mostly not many witnesses exist.

VI. Conclusion

Victims of enforced disappearance and their families who want to bring their cases to the Inter-American Court of Human Rights or European Court of Human Rights are confronted with various procedural hurdles. However, the jurisdiction of both Human Rights Courts is mainly in favor of the applicant. This is for example demonstrated by the acknowledgement of difficulties in the exhaustion of domestic remedies and friendly settlement in cases of enforced disappearance.

The main important shortcoming of the Inter-American Court is that individuals have no standing to bring a case. This can be seen in comparison to the European Court that enables many more victims to apply to it. Even though the rights of the applicant to present his case have been extended in recent years, the improvements are still insufficient. Especially cases of disappearance often require more research to prove a state practice of disappearance or to establish the whereabouts of a disappeared. The lawyers of the applicant are often more suited to discover this proof.

Furthermore, it is questionable whether the protection of victims and witnesses at the IACHR is always guaranteed, but the Inter-American Court has provided for extensive provisional measures which include the families of the witnesses and continue even after the termination of the proceedings.

Applicants in the Inter-American System are confronted with more procedural difficulties than victims applying to the European counterpart. In Europe there was a constant development towards more procedural rights for the applicants, peaking in 1998 with the introduction of an individual complaint procedure. It would be most welcomed if the Inter-American Court would follow this model and would introduce changes to enhance the rights of individuals applying to it and to reduce its procedural hurdles.

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27 Kurt v. Turkey, ECHR, 25. May 1998, para.19ff.

28 At the time of the decision the right to individual application was determined in Art. 25 of the European Convention on Human Rights.

29 Kurt v. Turkey, ECHR, 25. May 1998, para.159.

Gabiella Citroni

5

Interpretation of the Substantive Provisions of the Convention

I. Introduction

The entry into force on 23 December 2010 of the International Convention on the Protection of All Persons from Enforced Disappearance ("the Convention"), and the beginning of the work in 2011 of the Committee on Enforced Disappearances ("the Committee") mark a historical development in the struggle against enforced disappearance. In fact, the very adoption of the Convention must be seen as the outcome of more than 30 years of combat by relatives of disappeared people from all over the world, civil society organisations and like-minded states. Now that this outstanding objective has been achieved, it is time to have the treaty duly implemented by states parties and domestic legislation and practice modified accordingly. In this light, the interpretation to be given to the substantive provisions of the Convention will play a crucial role.

This contribution¹ aims at singling out the most delicate issues related to the interpretation of certain pro-

visions of the Convention that are likely to arise in the near future and at analyzing the potential answers.

II. The Definition of the Offense and its Constitutive Elements

Indisputably, one of the first matters on which interpretation will be required will be the very definition of the offense of enforced disappearance and its constitutive elements.² This subject was very much debated during the 3-year negotiations that led to the adoption of the Convention.³ The drafters of the Convention mainly took into consideration the three existing definitions of the offense contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance ("the 1992 Declaration");⁴ the 1994 Inter-American Convention on the Forced Disappearance of Persons ("the 1994 Inter-American Convention");⁵ and the 1998 Rome Statute for the establishment of an International Criminal Court ("the Rome

- 1 Based on an intervention of the author at the "Conference on Enforced Disappearances" held on 25 April 2012 in Berlin and organised by the German Institute for Human Rights, the Nuremberg Human Rights Centre, and the University of Erlangen-Nuremberg.
- 2 On the possible interpretations related to the definition of enforced disappearance included in the Convention see, inter alia, Vermuelen, *Enforced Disappearance – Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Antwerp, 2012, pp. 53-58; Ott, *Enforced Disappearance in International Law*, Antwerp, 2011, pp. 197-200; and Scovazzi, Citroni, *The Struggle against Enforced Disappearance and the 2006 United Nations Convention*, Leiden, 2007, pp. 267-285.
- 3 On this see the Reports of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance: respectively, doc. E/CN.4/2003/71 of 12 February 2003; doc. E/CN.4/2004/59 of 23 February 2004; doc. E/CN.4/2005/66 of 10 March 2005; and doc. E/CN.4/2006/57 of 2 February 2006.
- 4 The preamble of the 1992 Declaration defines enforced disappearance in the following terms: "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organised groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law".
- 5 Article II of the 1994 defines enforced disappearance in the following terms: "the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorisation, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees".

Statute")⁶. It must be recalled that while the first two of these instruments are from international human rights law, the third one rather pertains to the domain of international criminal law. This contributes towards explaining some of the discrepancies among the texts of the relevant provisions. Among others, the definition included in the Rome Statute differs from the others in two main aspects: the inclusion of non-state actors among the possible perpetrators of the offense and the qualification of the "placement of the disappeared person outside the protection of the law" as a constituent element of the offense.

The definition of enforced disappearance enshrined in article 2 of the Convention reads as follows: "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 authorisation-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".

While in the case of "non-state" actors the choice of the drafters of the Convention has been clear in the sense of leaving them outside the provision defining the offense, the formula adopted with regard to the "placement of the victim outside the protection of the law" has in contrast been voluntarily left vague, to the point that the chairperson of the Intersessional Open-ended Working Group mandated to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance expressly called this a "constructive ambiguity".⁷

In the case of "non-state actors", even though many delegations insisted on the desirability of their inclusion in the definition of the offense along the lines of the Rome Statute, the outcome of the negotiations favoured their exclusion from the definition of the of-

fense, so as to highlight the primary responsibility of the states to prevent and suppress enforced disappearance, including those perpetrated by non-state actors. In fact, article 3 of the Convention establishes that "each state party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the state and to bring those responsible to justice". The inclusion of this clause seems to strike the right balance between the need to recognise the existence of an increasing number of instances where acts of the same nature as enforced disappearance are committed by non-state actors, and the fact that it is the state, upon ratification, that undertakes commitments *pursuant to* the Convention and can be held internationally responsible in the case of breaches of such obligations. In any case, it appears that the Committee is fully aware that this particular issue will be called into question when applying the Convention and therefore at its first session it declared that the subject requires further exploration through a general comment.⁸

With regard to the nature of the "placement outside the protection of the law", scholars have repeatedly stressed that it must be considered as a consequence of the offense and not as a constitutive element.⁹ Further, the Working Group on Enforced or Involuntary Disappearances (WGEID) has also pronounced itself on this delicate issue on different occasions, even though a recent interpretative change may suggest that it has not yet taken a conclusive position. In fact, while in a general comment on the definition of enforced disappearance issued in 2007 the WGEID declared that "in accordance with article 1.2 of the Declaration, any act of enforced disappearance has the *consequence of placing the persons subjected thereto outside the protection of the law*",¹⁰ and while it upheld the same approach in 2010 in a study on best practices on enforced disappearances in domestic criminal legislation,¹¹ it abruptly abandoned this interpretation in 2011. In a

6 Article 7, 2 (i) of the Rome Statute includes enforced disappearance among crimes against humanity when committed as part of a widespread or systematic attack against any civilian population with the knowledge of the attack, and defines it in the following terms: "the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time".

7 See doc. E/CN.4/2006/57, supra note 2, para. 93.

8 See Draft Report of the Committee on Enforced Disappearances on its First Session, available at http://www.ohchr.org/Documents/HRBodies/CED/Draft_report_CED_1st_session.pdf, para. 14 (b).

9 See Vermuelen, Enforced Disappearance, supra note 1, p. 58; Ott, Enforced Disappearance in International Law, supra note 1, p. 199; and Scovazzi, Citroni, The Struggle against Enforced Disappearance and the 2007 United Nations Convention, supra note 1, pp. 282-285.

10 WGEID, General Comment on the Definition of Enforced Disappearance, 2007, available at http://www.ohchr.org/Documents/Issues/Disappearances/disappearance_gc.pdf, para. 5.

11 WGEID, Study on Best Practices on Enforced Disappearances in Domestic Criminal Legislation, doc. A/HRC/16/48/Add.3 of 28 December 2010, paras. 30-32.

general comment on the right to recognition as a person before the law in the context of enforced disappearances, the WGEID affirmed that "one of the constitutive elements of enforced disappearances is that the person is placed 'outside the protection of the law'".¹² Regrettably, the WGEID did not provide any explanation for such a sudden interpretative change.

In this light, the Committee will soon have to take a position on this delicate subject and it seems that upholding the interpretation according to which the "placement outside the protection of the law" is a consequence of the offense is definitely most conducive to the protection from enforced disappearance.

III. The Codification of Enforced Disappearance as an Autonomous Offense

Article 4 of the Convention establishes that "each state party shall take the necessary measures to ensure that enforced disappearance constitutes an offense under its criminal law". This provision must be read in conjunction with articles 6 and 7 of the Convention. The former obliges states parties to hold criminally responsible at least any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to, or participates in an enforced disappearance, and sets forth a comprehensive scheme with regard to superior responsibility. Article 7 for its part provides that states parties shall make the offense of enforced disappearance punishable by appropriate penalties that take into account its extreme seriousness and that they may establish mitigating or aggravating circumstances.

The provisions mentioned do not seem to pose any interpretative challenge: states must codify enforced disappearance as a separate criminal offense in their domestic criminal legal system, yet it is predictable that some states parties will try to challenge this crystal-clear rule.¹³

As a matter of fact, article 4 of the 1992 Declaration sets forth that "all acts of enforced disappearance shall be offenses under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness". For its part, article III of the 1994 Inter-American Convention establishes that states parties "[...] undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. [...]".

Notwithstanding the existence of these precedents, to date only few states have codified enforced disappearance as a separate and autonomous crime in their domestic legislation, while an increasing number of states has codified enforced disappearance in their criminal code as a crime against humanity (therefore only when committed as part of a widespread or systematic attack against the civilian population).

States have shown a tendency to argue that, even if they have not incorporated the crime of enforced disappearance in their criminal codes, their legislation provides for safeguards against various offenses that are linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. Furthermore, other states allege that it is enough to codify enforced disappearance as a crime against humanity, usually limiting themselves to merely reproducing in their criminal codes the definition of the crime as contained in the Rome Statute.

The WGEID has closely monitored this particular issue over the years, as it remains a cause for concern, as the codification of enforced disappearance as an autonomous crime in domestic legislation is strictly connected with an effective prevention and eradication of the practice. In 1995 the WGEID issued a general

12 WGEID, General Comment on the Right to Recognition as a Person before the Law in the Context of Enforced Disappearances, 2011, available at: <http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf>, preamble and para. 1.

13 This fear is somehow corroborated by the experience of the Committee against Torture over the past decades. In fact, also the Convention against Torture establishes a similar obligation for states parties with regard to the autonomous codification of the offense of torture. Nonetheless, states parties continue challenging this interpretation (that indeed seems to be in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose) and providing disputable excuses not to comply with their obligation. See, inter alia, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, doc. A/HRC/13/39/Add.5 of 5 February 2010, paras. 46-49 and 132-145; Committee against Torture (CAT), Concluding Observations on Italy, doc. CAT/C/ITA/CO/4 of 16 July 2007, para. 5; Concluding Observations on Zambia, doc. CAT/C/XXVII/Concl.4 of 23 November 2001, para. 8. (b); and Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Report, doc. A/56/156 of 3 July 2001, para. 39.(a). See also Rodley, Pollard, *Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, en *European Human Rights Law Review*, 2006, pp. 115-141.

comment on article 4 of the 1992 Declaration,¹⁴ and in 2010 it published the already mentioned study on best practices on enforced disappearances in domestic criminal legislation.¹⁵

These references shall certainly be taken into account both by states parties and the Committee when it comes to interpreting articles 4, 6 and 7 of the Convention. In particular, with regard to the arguments usually put forward by states to justify the lack of an autonomous offense of enforced disappearance in their criminal code, the WGEID convincingly affirmed that "a plurality of fragmented offenses does not mirror the complexity and the particularly serious nature of enforced disappearance. While the offenses mentioned may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short of guaranteeing a comprehensive protection",¹⁶ and that "experience shows that enforced disappearances often do not occur as part of a widespread or systematic attack against civilians. In this perspective, criminalising enforced disappearance in domestic law only when committed in this specific context implies that many acts of enforced disappearance remain outside the scope of domestic criminal law and the jurisdiction of national courts".¹⁷

IV. The Establishment of Quasi-Universal Jurisdiction

Articles 9 to 11 of the Convention set forth the bases for the establishment by states parties of quasi-universal jurisdiction in cases of enforced disappearance. These provisions recalling those included, for instance, in the Convention against Torture,¹⁸ represent a solid bulwark against impunity as they ensure that persons responsible for enforced disappearances cannot find safe havens.

States parties shall establish their competence to exercise jurisdiction over the offense of enforced disappearance a) when the offense is committed in any territory under their jurisdiction or on board a ship or aircraft registered in the state concerned, b) when the alleged offender is one of their nationals, and c) when the disappeared person is one of their nationals and the state concerned considers it appropriate. Furthermore, the principle *aut dedere aut judicare* is affirmed: a state shall establish its competence to exercise jurisdiction over the offense of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another state in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognised. Indeed, if a state in the territory under whose jurisdiction a person alleged to have committed an enforced disappearance is found does not extradite such person or does not surrender him or her, it shall submit the case to its competent authorities for the purpose of prosecution. Article 10 complements this scheme by establishing that any state party in whose territory a person suspected of having committed an offense of enforced disappearance is present "shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence" and "immediately carry out a preliminary inquiry or investigations to establish the facts".

Since other international human rights mechanisms have already developed a consistent jurisprudence on how to interpret the obligations of the states *vis-à-vis* the establishment of quasi-universal jurisdiction, the Committee will have sound references with which to interpret the relevant provisions of the Convention. In particular, the Committee will have to monitor that the scope of universal jurisdiction provisions at the domestic level is not unduly limited by overly strict requirements such as the fact that the suspect be normally resident in the state concerned,¹⁹ or a double criminality requirement.²⁰ Finally, the Committee shall

14 WGEID, General Comment on Article 4 of the Declaration, in doc. E/CN.4/1996/38 of 15 January 1996, para. 54.

15 *Supra* note 10.

16 WGEID, Study on Best Practices on Enforced Disappearances in Domestic Criminal Legislation, *supra* note 10, para. 11.

17 *Ibid.*, para. 16.

18 In this sense see also, among others, United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Principles to Combat Impunity), recommended by Commission on Human Rights resolution E/CN.4/RES/2005/81 of 21 April 2005, Principle 21. In the 1992 Declaration see articles 14 and 15 and in the 1994 Inter-American Convention see articles I, b), IV and VI.

19 CAT, Conclusions and Recommendations on France, doc. CAT/C/FRA/CO/4-6 of 20 May 2010, para. 19.

20 CAT, Conclusions and Recommendations on Kazakhstan, doc. CAT/C/KAZ/CO/2 of 12 December 2008, para. 19; and Conclusions and Recommendations on the Former Yugoslav Republic of Macedonia, doc. CAT/C/MKD/CO/2 of 21 May 2008, para. 11.

interpret the Convention so that the obligation of the state to prosecute an alleged perpetrator of an enforced disappearance applies even in the absence of an extradition request.²¹

V. The Obligation to Adopt Preventive Measures

The Convention also spells out in detail a number of obligations that states parties must respect to prevent enforced disappearance.²² Articles 17, 18, 19 and 21 of the Convention represent the core of such prevention scheme. Besides establishing that "no one shall be held in secret detention" (article 17, para. 1) and that "any person deprived of liberty shall be held solely in officially recognised and supervised places of deprivation of liberty" (article 17, para. 2, c), the provisions concerned set forth a precise regime aiming at protecting all persons deprived of their liberty and at guaranteeing access to basic information on the latter to relatives, their representatives or their counsel.²³ This is indeed essential when it comes to ensuring that persons deprived of their liberty are not placed outside the protection of the law and it mirrors the fact that often enforced disappearance may begin with a regular arrest. It must be stressed that the International Committee of the Red Cross, historically pays special attention to the protection of persons deprived of their liberty, played a key role in the inclusion of these provisions and in their actual drafting.

According to article 17 of the Convention, states parties shall guarantee, among other things, that persons deprived of liberty are authorised to communicate with and can be visited by their family, counsel or any other person of their choice (and, in the case of foreigners, that they are entitled to communicate with their consular authorities). Moreover, competent and legally authorised authorities and institutions must be guaranteed access to places where persons are deprived of liberty. Any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstanc-

es, be entitled to take proceedings before a court, so that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

Furthermore, states shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of their liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution. The registers shall contain some core information (e.g. the identity of the person deprived of liberty and elements concerning his or her state of health, the authority responsible for supervising the deprivation of liberty, and, in the case of release or transfer, the date and time of the latter). As previously mentioned, access to such core information must be guaranteed to any person having a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel. Interestingly, article 18, para. 2 establishes that states shall take appropriate measures to protect these persons, as well as those participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty. In any case, the collection, processing, use and storage of personal information, including medical and generic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

Finally, states parties shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. The physical integrity and the ability to fully exercise rights at the time of release shall be verified.

It must be stressed that, for different reasons, the drafting and contents of the provisions mentioned were not necessarily endorsed by all states taking part in the negotiations of the treaty. For instance, Germany repeatedly raised concerns with regard to potential conflicts between these preventive measures aiming at avoiding the enforced disappearance of people by making information accessible to crucial stakeholders

21 CAT, Case Suleymane Guengueng et al. v. Senegal, views of 19 May 2006, para. 9.7; and Herman Burgers and Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht, 1988, p. 137.

22 On this aspect see articles 2, para. 2; and 3 of the 1992 Declaration and article I.c) of the 1994 Inter-American Convention.

23 On this aspect see articles 9-12 of the 1992 Declaration and articles X and XI of the 1994 Inter-American Convention.

and the right to privacy. In fact, Germany did not deem satisfactory the final wording of articles 17 to 21 of the Convention, and at the moment of ratifying the Convention, formulated various interpretative declarations which, in some cases, may also seem to be close to reservations.²⁴

VI. Limitations to the Right to Obtain Information on Persons Deprived of their Liberty

The resistance of many states to granting full access to core information relating persons deprived of liberty (which, it is worth recalling, would not be disclosed indiscriminately, but to a number of selected people and under due guarantees), led to the introduction of a sort of "compromise clause", that is article 20: "only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, states parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1.

This right to a remedy may not be suspended or restricted in any circumstances".

The somehow questionable wording of this provision may be explained by the perceived tensions between the guarantee of access to information on persons deprived of their liberty as a means to prevent enforced disappearance and ensure the right to know the truth, and the need expressed by various delegations to limit the access to such information for reasons such as not hindering a criminal investigation, or privacy. During the negotiations with regard to the protection of privacy and personal data, several delegations considered that the guarantees offered remained inadequate. Others pointed out that protecting certain rights which were at risk in the event of an enforced disappearance, such as the right to life, security and physical integrity, was more important than protecting privacy, and that efforts to protect the latter should not result in diminished protection against enforced disappearance.²⁵ Some delegations even requested that article 20 should include a reference to national security. It was also proposed that the provision should refer not only to the security of the person deprived of liberty but also to public security. Several participants were opposed to such an addition arguing that it ran counter to the very spirit of the instrument.²⁶

When the text of article 20 in its current formulation was presented by the chairperson during the negotiations, some delegations considered that this provision should be removed, as it was inimical to the very purposes of the instrument. Many delegations expressed a readiness to accept the text for the sake of consensus. Several emphasised that states parties should in no case withhold information on the place of detention. Others opposed the addition of a provision to that effect on the grounds that the article would apply not

24 Regarding art. 17 (2) (f): "Under German law it is guaranteed that deprivation of liberty is only lawful if it has been ordered by a court or – in exceptional cases – subsequently authorised by a court. Article 104 para. 2 of the Basic Law (Grundgesetz) expressly provides: 'Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay'. Article 104 para. 3 of the Basic Law provides that a person who has been provisionally arrested on suspicion of having committed a criminal offense 'shall be brought before a judge no later than the day following the arrest'. In the event that a person is being held arbitrarily in contravention of article 104 of the Basic Law, anyone can bring about a judicial decision leading to that person's release by applying to the competent Local Court for his/her immediate release. If the person concerned has been detained beyond the time limit permissible under the Basic Law, the court has to order that person's release pursuant to section 128 (2), first sentence, of the Code of Criminal Procedure (Strafprozessordnung, StPO)". Regarding article 17 para. 3: "In the case of an involuntary placement of sick persons by a custodian or a person having power of attorney, the information required under letters (a) to (h) is known to the court which authorises the placement. The court can ascertain the information required under letters (a) to (h) at any time through the custodian or person having power of attorney; the information is then included in the case-file. This information is also to be regarded as records within the meaning of article 17 para. 3". Regarding article 18: "Under German law, all persons with a legitimate interest are entitled to obtain information from the court files. The restrictions provided for in German law for the protection of the interests of the person concerned or for safeguarding the criminal proceedings are permissible pursuant to Article 20 para. 1 of the Convention".

25 Doc. E/CN.4/2004/59, supra note 2, para. 125.

26 Doc. E/CN.4/2005/66, supra note 2, para. 90 (in general, on the debate on this issue, see paras. 89-94).

only in cases of enforced disappearance but also in the case of detentions where there was no risk of disappearance. In some countries, however, the law provided for the possibility that the place of detention might not be revealed on grounds such as witness protection. In that regard, one delegation also proposed deleting the reference in the second sentence of the first paragraph to information on whether a person had been deprived of liberty.²⁷

The Committee will most likely be called to interpret article 20 and the intricate list of conditions and exceptions for the potential limitation of access to core information on persons deprived of their liberty. It will have to take into account the dynamics of the negotiations and, in the end, the rule to always prefer the interpretation that is most conducive to the protection of human rights. In this light, the right to know the truth as well as the necessity to disclose information to prevent an enforced disappearance and thus a potential violation of the right to life and the prohibition of torture will certainly prevail over other considerations, including the protection of the right to privacy.

VII. The Cornerstone of the Convention: Article 24

Article 24 of the Convention is certainly one of the most advanced and articulated provisions within the whole treaty.

It embraces a wide notion of "victim" of enforced disappearance, affirming that this encompasses not only the disappeared person, but also any *individual who has suffered harm as the direct result of an enforced disappearance*. The wording of this provision mirrors

the case law developed over the years by different international human rights mechanisms.²⁸ Relatives of disappeared persons are certainly covered but this definition; it can be extended as to include also a "collective" dimension of the harm when the individuals subjected to enforced disappearance are, for instance, members of a trade union, an association or an organisation, and have been targeted specifically for this reason. In such cases, also the association they belong to has arguably suffered harm as the direct result of their enforced disappearance and should therefore be considered as a victim. The Committee will have to determine whether or not it wants to interpret article 24, paragraph 1, so as to encompass also this collective dimension.

Paragraph 2 of article 24 enshrines a significant development in international human rights law, as it provides that each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. The right to know the truth was previously recognised only in international humanitarian law,²⁹ and article 24 of the Convention comes as the crystallisation of a trend according to which the non-derogable right to know the truth, both in its individual and collective dimension, must be recognised and guaranteed under any circumstance.³⁰

Article 24 paragraph 3 establishes that "each state party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains". This provision also represents a *first* in international human rights law and reflects the reality faced by relatives of disappeared people throughout the world with regard to the phenomena of removal,

27 Doc. E/CN.4/2006/57, supra note 2, para. 17 (in general, on the debate on this issue, see paras. 16–26).

28 Reference here is in particular to the case law of the Inter-American Court of Human Rights, the Human Rights Committee and the European Court of Human Rights. Indeed, it is interesting to take into account also the definition of "victim" provided by the Principles to Combat Impunity, supra note 17: "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation" (Principle 8).

29 Article 32 of the First Additional Protocol to the Four Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts (1977).

30 In general, on the contents of the right to the truth in cases of enforced disappearance, see WGEID, General Comment on the Right to the Truth in Relation to Enforced Disappearance, 2010, available at: http://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf. For comprehensive studies on the right to the truth, see United Nations, Human Rights Council, Right to the Truth, doc. A/HRC/5/7 of 7 June 2007; Commission on Human Rights, Study on the Right to Truth, doc. E/CN.4/2006/91 of 8 February 2006. See also United Nations, Commission on Human Rights, Resolution on the Right to Truth, doc. E/CN.4/2005/L.84 of 15 April 2005. Further, see ICRC, *The Missing: the Right to Know. Summary of the Conclusions arising from Events held prior to the International Conference of governmental and non-governmental Experts, Geneva, 2003*; Principles to Combat Impunity, supra note 17, Principle 5; and Principles on the Right to a Remedy, supra note 17, Principles 22 and 24.

concealment and manipulation of mortal remains, mass graves, and localisation, exhumation and identification of mortal remains.³¹

Paragraphs 4 and 5 of article 24 spell out the obligation of states to guarantee that victims of enforced disappearance obtain prompt, fair and adequate compensation as well as reparation, which should include restitution, rehabilitation, satisfaction (including restoration of dignity and reputation), and guarantees of non-repetition. These provisions are certainly inspired by the jurisprudence developed over the past years by the Inter-American Court of Human Rights, as well as by the United Nations Basic Principles on the Right to Remedy and Reparation. The interpretation of the Committee when delivering its views on communications will be of the utmost importance and it may also influence the jurisprudence of the European Court of Human Rights, which so far – also in cases of enforced disappearances has refused to award measures of reparation other than pecuniary compensation.

Paragraph 6 of article 24 adequately mirrors the need to regulate the legal status of the disappeared person as well as that of his or her relatives: "without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each state party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights". In interpreting this provision the Committee will certainly benefit from the recent general comment of the WGEID on the right to recognition as a person before the law in the context of enforced disappearances, it indicates that "[...] such an acknowledgement should take the form of a 'declaration of absence by reason of enforced disappearance' to be issued with the consent of the family by a state authority after a certain time has elapsed since the disappearance, in any case no less than one year. Such

a declaration should allow the appointment of a representative of the disappeared person with the mandate to exercise his/her rights and obligations for the duration of his/her absence, in his/her interests and those of his/her next-of-kin. The latter should be allowed to temporarily manage the disappeared person's property for as long as the enforced disappearance continues, and to receive due assistance from the state by way of social benefits. In most cases, the disappeared persons are men and were the family breadwinners and so special social support should be provided to dependent women and children. The acceptance of financial support for members of the families should not be considered as a waiver of the right to integral reparation for the damage caused by the crime of enforced disappearance, in accordance with article 19 of the Declaration".³²

Finally, paragraph 7 of article 24 establishes that "Each state party shall guarantee the right 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 of enforced disappearance". This provision recognises the crucial importance of protecting members of associations of relatives of disappeared people or organisations that work to support relatives of disappeared people that in many parts of the world have often been targeted and harassed because of their efforts.

VIII. The Limitations *ratione temporis* of the Committee on Enforced Disappearances

Article 35 of the Convention establishes that "1. The Committee shall have *competence* solely in respect of enforced disappearances which commenced after the entry into force of this Convention. 2. If a state becomes a party to this Convention after its entry into force, the obligations of that state vis-à-vis the Committee shall relate only to enforced disappearances

31 On these matters see also Human Rights Council, Progress Report of the Human Rights Council Advisory Committee on Best Practices on the Issue of Missing Persons, doc. A/HRC/14/42 of 22 March 2010; and e Report on the Best Practices in the Matter of Missing Persons, prepared by the drafting group of the Advisory Committee on missing persons, doc. A/HRC/AC/6/2 of 22 December 2010.

32 WGEID, General Comment on the Right to Recognition as a Person before the Law in the Context of Enforced Disappearances, supra note 11, paras. 8 and 9. See also para. 10 in the sense that, beside issuing a "declaration of absence due to enforced disappearance", states maintain their obligation to investigate, judge and sanction those responsible, as well as to establish the truth on the fate and whereabouts of the victim.

which commenced after the entry into force of this Convention for the state concerned".³³

Indisputably, the interpretation of this provision will be at issue in the near future, as the potential extension of the competence of the Committee³⁴ on cases of enforced disappearance that began in the past and are still ongoing is one of the most sensitive issues related to the Convention. The interpretation that the Committee will give to the notion of "commencement" of the offense will be of crucial importance. Indeed, while there are early indications that the Committee sees itself as competent solely with regard to "the future", some experts advocate in favor of a more flexible interpretation of the clause that duly takes into account the continuous nature of enforced disappearance and that seeks to expand, as far as possible, the application of the powers of the Committee.³⁵ In this sense, De Frouville indicates that article 35 establishes "only a *jurisdictional* limitation. No comparable clause has been adopted in the substantive part of the International Convention on the Protection of All Persons from Enforced Disappearance, so that the obligations apply to an enforced disappearance which commenced before the entry into force of the International Convention on the Protection of All Persons from Enforced Disappearance for the state concerned, as long as this enforced disappearance continues after the entry into force, i.e. as long as it is 'unresolved'".³⁶ In the same sense, other experts argued that the word "competence" in article 35 of the Convention must be seen as referring solely to the powers entrusted to the Committee pursuant to articles 31 and 32 of the Convention (reception and consideration of individual and inter-state communications) that require a specific declaration of acceptance by states parties to the Convention. On the contrary, the temporal limitation on the Committee would not encompass its other functions: in this sense, reference to en-

forced disappearances that commenced in the past and are still ongoing could be included in the reports on the measures taken by states parties to give effect to their obligations under the Convention and the related observations and recommendations formulated by the Committee (article 29 of the Convention). Moreover, cases of enforced disappearance that commenced in the past may also be considered when the Committee carries out a country visit (article 33) or when the Committee deems it appropriate to urgently refer to the General Assembly of the United Nations, through the Secretary-General, information containing well-founded indications that enforced disappearance is being practised on a widespread or systematic basis (article 34). In fact, taking into account also cases of enforced disappearance that commenced prior to the entry into force of the Convention is essential when it comes to establishing the existence of a widespread or systematic practice of enforced disappearance in a given country.

Whatever the interpretation that the Committee will eventually give to article 35 of the Convention, the continuous nature of the offense of enforced disappearance shall be duly taken into account, as well as the consequences that other international human rights bodies have attached to it when assessing their own competences over specific cases. In particular, it is worth recalling that in a landmark judgment on this matter the Inter-American Court of Human Rights held that "pursuant with the principles of *pacta sunt servanda*, it is only as of that date [entry into force of the treaty], that the obligations of the treaty are in force for [the respondent state], and by virtue of that, it is applicable to those facts that constitute violations of a continuous or permanent nature, that is, those that occurred prior to the entry into force of the treaty and persist even after that date, since they are still being committed. Stating the contrary would be the same

33 It is noteworthy that in an initial drafting of the provision, the limitation of the competence of the Committee was limited to "deprivations of liberty that commenced after the entry into force of the Convention". Interestingly, during the negotiations it was pointed out that "[...] there were two kinds of retroactivity: that of the instrument itself, and that of the competence of the monitoring body. Delegations agreed that there was no need for an explicit reference to the former in the text, because the general rule that the instrument would apply from the time it entered into force for the state concerned remained valid. As regards the competence of the monitoring body, they supported article II-E, paragraph 1, of the draft, which provided that the monitoring body had competence only in respect of deprivations of liberty which commenced after the entry into force of the instrument", doc. E/CN.4/2004/59, supra note 2, para. 165.

34 On the Committee on Enforced Disappearances see, inter alia, de Frouville, *The Committee on Enforced Disappearances*, in Alston, Megret (eds.), *The United Nations and Human Rights: A Critical Appraisal*, 2nd ed. to be published by Oxford University Press. Currently available at <http://www.frouville.org>; and Citroni, Bianchi, *The Committee on Enforced Disappearances: Challenges Ahead*, in *Rivista diritti umani e diritto internazionale*, No. 1, 2012, pp. 127-168.

35 Article 8, para. 1 (b), of the Convention expressly refers the "continuous nature" of the crime. Article 24, para. 6, of the Convention reaffirms the continuous nature of the offense, stressing "the obligation [of the State] to continue the investigation until the fate of the disappeared person has been clarified". See also, inter alia, WGEID, *General Comment on Enforced Disappearance as a Continuous Crime*, 2010.

36 De Frouville, *The Committee on Enforced Disappearances*, supra note 33, p. 9.

as depriving the treaty itself and the guarantee of protection established therein of its *effet utile* with negative consequences for the alleged victims in the exercise of their right to a fair trial".³⁷ For its part, the WGEID clarified that "[...] an enforced disappearance is a unique and consolidated act, and not a combination of acts. Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented".³⁸ Moreover, the WGEID declared that "[...] *when an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the state that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction*".³⁹

IX. Interpreting the Silences of the Convention

Not only will the provisions of the Convention have to be interpreted, but also its "silences". In this sense, there are two main gaps: the Convention does not deal with amnesty laws or similar measures that may exempt those alleged to have committed an enforced disappearance from criminal proceedings and sanctions, and it does not explicitly prohibit granting military courts the jurisdiction to try persons alleged to have committed an enforced disappearance.

Even though consistent case-law has been developed over the past years, on these two crucial issues, which are closely related to the struggle against impunity, it was regrettably impossible to reach an agreement dur-

ing the negotiations of the Convention, and eventually silence was preferred.⁴⁰ This is indeed a step backwards when compared to the provisions contained in the 1992 Declaration and in the 1994 Inter-American Convention.⁴¹ Article 16, paras. 2 and 3, of the 1992 Declaration establish that persons alleged to have committed an enforced disappearance "shall be tried only by the competent ordinary courts in each state, and not by any other special tribunal, in particular military courts. No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations"; and article 18 provides that persons who have or are alleged to have committed an enforced disappearance "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account".

Over the years the WGEID has constantly recalled the pivotal role played by these provisions in the struggle against impunity and has adopted general comments that spell out in detail the measures that states ought to undertake to effectively implement their obligations.⁴²

On the same matters, article IX of the 1994 Inter-American Convention sets forth: "persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions. The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties. Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations".

37 IACHR, Case Radilla Pacheco v. Mexico, judgment of 23 November 2009, Ser. C No. 209, para. 24.

38 WGEID, General Comment on Enforced Disappearance as a Continuous Crime, supra note 34, para. 2.

39 Ibid., para. 3. (emphasis added). Moreover, with regard to the possibility of formulating interpretative declarations or potential reservations concerning the competence *ratione temporis* of the CED, the principle affirmed by the WGEID must be recalled: "[...] reservations that exclude the competence of such a body for acts or omissions that occurred before the entry into force of the relevant legal instrument or the acceptance of the institution's competence should be interpreted so not to create an obstacle to hold a State responsible for an enforced disappearance that continues after this" (WGEID, General Comment on Enforced Disappearance as a Continuous Crime, supra note 34, para. 8).

40 E/CN.4/2003/71, supra note 2, paras. 47-48 and 52; doc. E/CN.4/2004/59, supra note 2, paras. 73-80 and 91-93; and E/CN.4/2005/66, supra note 2, para. 58.

41 See also the Principles to Combat Impunity, supra note 17, Principles 24 and 29.

42 In particular see WGEID, General Comment on article 18, doc. E/CN.4/2006/56 of 27 December 2005, para. 49.

The Inter-American Court of Human Rights has pronounced itself on a number of occasions on these matters, setting a conspicuous case-law. Since 2001 it affirmed that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognised by international human rights law".⁴³ Moreover, the Court held that "[...] military criminal jurisdiction in democratic states, in times of peace, has tended to be reduced and has even disappeared, reason for which, if a state conserves it, its use shall be minimum, as strictly necessary, and shall be inspired on the principles and guarantees that govern modern criminal law. In a democratic state of law, the *military criminal jurisdiction shall have a restrictive and exceptional scope and be directed toward the protection of special juridical interests*, related to the tasks characteristic of the military forces. Therefore, the Tribunal has previously stated that *only active soldiers shall be prosecuted within the military jurisdiction for the commission of crimes or offenses that based on their own nature threaten the juridical rights of the military order itself*. [...] Likewise, this Court has established that, taking into account the nature of the crime and the juridical right damaged, *military criminal jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of violations of human rights but that instead the processing of those responsible always corresponds to the ordinary justice system*. [...] Therefore, [...] it shall be concluded that if the criminal acts committed by a person who enjoys the classification of active soldier does not affect the juridical rights of the military sphere, ordinary courts should always prosecute said person. In this sense, *regarding situations that violate the human rights of civilians, the military jurisdiction cannot operate under any circumstance*".⁴⁴

Accordingly, when the Committee has to interpret the silences of the Convention, it can rely on solid bases to build upon, finding substantial references to turn to in the provisions mentioned and well established international case-law.

X. Concluding Observations

The Convention is a powerful tool to prevent and eradicate the practice of enforced disappearance, and the manner in which the Committee will interpret it will make a difference by determining the reading that is most conducive to the protection of human rights.

One aspect that is not very well developed in the Convention is the gender dimension of enforced disappearance, although unfortunately, women are disproportionately affected by this phenomenon. The Committee has already sent out a strong signal in acknowledging that it must wear "gender lenses" while reading the Convention, as since its very first session, it has included "women and children affected by forced disappearance among the substantive issues that require further exploration, possibly through a general comment".⁴⁵

Putting the victims of this abominable practice at the heart of the interpretative exercise is certainly a positive attitude to take, as it should avoid the risk of an overly formalistic approach to the detriment of thousands of people who continue being kept between hope and despair and who deserve that the Convention they have struggled for over the past 30 years will in fact be a means for obtaining truth, justice and redress.

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43 IACHR, Case Chumbipuma Aguirre and others (Barrios Altos) v. Peru, judgment of 14 March 2001, Ser. C No. 75, para. 41.

44 IACHR, Case Radilla Pacheco, supra note 36, paras. 272-274. (emphasis added).

45 Draft Report of the Committee on Enforced Disappearances on its First Session, 2011, supra note 7, para. 14 (c).

Maria Giovanna Bianchi

6

The Working Group and the Committee on Enforced Disappearances: complementarity and differences

The Working Group on Enforced or Involuntary Disappearances (WGEID) was established in 1980 by resolution XX/1980 of the then Commission on Human Rights. It was the first ever Special Procedure mechanism created by the United Nations system with the humanitarian mandate to act as a channel of communications between the families of the disappeared persons and the states that allegedly perpetrated the enforced disappearance.

In 1992, with the adoption by the General Assembly of the Declaration on the Protection of All Persons from Enforced Disappearance, the WGEID was tasked with the additional mandate of monitoring its implementation by the states. In order to carry out its mandates the WGEID developed appropriate tools such as the classification of cases as clarified, closed or discontinued; urgent actions, which are sent when the case is reported within three months of the disappearance; joint appeals with other special procedures; prompt intervention letters to call for the protection of persons who are related to victims of enforced disappearances and for this reason are themselves potential victims of reprisals or harassment; and general comments which interpret the provisions of the Declaration.¹

The Committee on Enforced Disappearances (CED) was established in order to monitor the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) when the latter entered into force. Of all existing treaty-monitoring bodies the CED is the one which was entrusted with particularly original functions. Like other treaty bodies, the CED will examine the reports submitted by the state parties

(article 29); consider individual complaints (article 31) and inter-states complaints (article 32), produce concluding observations and general comments. Departing from other treaty bodies, the CED has the ability to activate an "early warning and urgent action" requesting that a person be found as a matter of urgency, without the requirement that the internal remedies be exhausted (article 30); request to carry out visits in states which are allegedly violating the CPED (article 33); and bring to the attention of the General Assembly information that enforced disappearance is being practiced in a widespread or systematic manner by a state party.²

The differences between the WGEID and the CED are evident, the one being a thematically special procedure created by a resolution of the Commission on Human Rights and tasked to monitor a non-binding Declaration all over the world, while the other one stems from a Convention legally binding only on those states which are parties to it. Although some countries, during the negotiations of the Convention, opposed the creation of a new committee on the basis of the existence of a mechanism which was already devoted to enforced disappearances, the WGEID, this argument could be easily refuted as the co-existence of a treaty-monitoring body and a special procedure dealing with the same subject matter, rather than being the exception is indeed the norm in the United Nations system.

The tools at the disposal of the WGEID and the CED are different but their perspectives on the fight against enforced disappearance and the protection of the victim should be complementary and result in a substan-

1 The methods of work of the WGEID can be consulted on its website at the following link: <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>

2 Information on the CED and its work can be found at the following link: <http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx>

tive cooperation going beyond the mere "exchange of information".³ In practical terms they shall promote each other's work; make cross-reference to their respective communications, recommendations, general comments and concluding observations; design common country strategies; take concerted actions at national and regional levels; issue joint press releases; and organise joint thematic discussions. The two mechanisms have already started a close cooperation by deciding to hold a regular annual meeting during their overlapping sessions in November, and they will also report back jointly to the General Assembly.

The competencies of the WGEID and the CED could however overlap in the specific case of an urgent action procedure, which is currently used by the WGEID on the basis of its humanitarian nature, and which is

also foreseen by article 30 of the CPED, when such a request for an urgent action is submitted simultaneously to both mechanisms. The experts of the WGEID and CED are currently discussing their working methods in respect of this aspect of their work, which will be perhaps the more challenging one in terms of their coordination.

In conclusion, the WGEID and the CED have already shown their willingness to cooperate. When appropriate, this cooperative spirit should be transposed into provisions on the methods of work of the WGEID and into the rules of procedure of the CED.⁴

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3 CED is mandated to cooperate with other mechanisms as provided by article 28 of CPED. Within the UN system, of all established Committee none contains such a clause.

4 A full-fledged discussion on the coordination between the WGEID and the CED can be found in G. Citroni and M.G. Bianchi, "The Committee on Enforced Disappearances: Challenged Ahead", *Rivista diritti umani e diritto internazionale*, no. 1, 2012, pp. 127-168; link: http://www.francoangeli.it/riviste/Scheda_rivista.aspx?IDArticolo=45012&Tipo=Articolo%20PDF

Rainer Huhle

7

Emergency Procedure and Individual Complaints under Articles 30 and 31 of the CPDE

The International Convention for the Protection of All Persons from Enforced Disappearance (CPDE), adopted by General Assembly resolution 61/177 of 20 December 2006 and entered into force 23 December 2010 offers several rather innovative features in comparison with the other core human rights instruments. Among the unique characteristics of the Convention are the two mechanisms for individual communications to the Committee on Enforced Disappearances (henceforth "The Committee") provided in articles 30 and 31 of the Convention. In this note I shall comment on the differences and similarities of both procedures.

Article 30 has four paragraphs. Paragraph 1 reads:

1. A request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency, by relatives of the disappeared person or their legal representatives, their counsel or any person authorised by them, as well as by any other person having a legitimate interest.

This paragraph thus defines the purpose of the procedure: to ask the Committee for supportive action in searching and finding disappeared persons. This aim is understood here as a humanitarian action, its end being the reappearance of the (forcibly) disappeared person. The limitation of the action requested under article 30 to this humanitarian purpose is detailed in paragraph 3 of the article which defines the actions the Committee can initiate under this article. The Committee may, if the conditions defined in paragraph 2 are met,

transmit recommendations to the State Party, including a request that the State Party should take all the necessary measures, including interim measures, to locate and protect the person concerned

in accordance with this Convention and to inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation.

In addition to the goal of searching and finding given in paragraph 1 the Committee shall also request the respective state to protect the disappeared person. To this end, article 30 gives the Committee a broad scope of discretion concerning the measures it may request from the state.

The sad experience from most of the cases of enforced disappearance is that the disappeared person is not found alive or even dead. It is particularly important that paragraph 4 of article 30 instructs the Committee to "continue its efforts to work with the state party concerned for as long as the fate of the person sought remains unresolved." This provision reflects the reality of the practice of enforced disappearances, and it opens the door for the Committee to deal with individual cases it has been informed of as long as the disappearance persists. In its Rules of Procedure the Committee explicitly states that it may, in situations where a state party does not comply with a request made under article 30, make further recommendations or requests. This should prevent non-cooperation from being a practical option for the state. Since the "efforts to work with the state party" are not specified, these efforts might even include measures beyond the purely humanitarian action, e.g. the inclusion of cases in the preparation of concluding observations of a state's compliance with the Convention.

Another important feature of article 30 is the definition of the persons entitled to submit the communications. As in the definition of victims of enforced disappearance given in article 24 of the Convention, this definition is very inclusive. The range of persons (or,

by authorisation, also organisations) explicitly mentioned is already broad, and the addition of anybody else "having a legitimate interest" gives the Committee the flexibility to admit communications that might be necessary for example in cases of disappeared persons without relatives, or directly accused persons, to denounce the crime.

Article 30 is sometimes referred to as the instrument for "urgent actions". Careful analysis shows that this heading might lead to misunderstandings. Paragraph 1 provides that a request "may be submitted to the Committee, as a **matter of urgency**". This language indicates that the urgency refers to the procedure, not to a determined time frame. Once the Committee has accepted a request under article 30, it must proceed with due urgency to initiate the measures foreseen in paragraph 3. Of course, it is desirable, and certainly in the best interest of the victims, that a request to the Committee be made as soon as possible after the disappearance has occurred, but the Convention sets no formal time frame for this communication to be submitted - with good reason, since the historical record of enforced disappearances has produced so many difficult circumstances impeding the victims who wish to denounce the case that it should be left to the victims and other persons with legitimate interests to decide when they feel able to make this request.

Article 31 also deals with "communications from or on behalf of individuals" to the Committee. But these communications differ from those under article 30 in various respects. The most obvious difference is that communications under article 31 (as well as those under article 32) require a previous declaration by the state concerned accepting this procedure, whereas article 30 is obligatory for all member states of the Convention. What is it that makes article 31 so much more demanding that states decided to leave the procedure under this article to an additional declaration by each member state?

The reluctance of states to make the declaration pursuant to article 31 might be seen in the different purpose of both articles. While article 30 has a humanitarian objective, namely to find the missing person, article 31 aims at identifying violations of the Convention. As we have seen, a request for action under article 30 may, in the course of the follow-up procedures, finally lead to the conclusion that the state violated its obligations under the Convention. But this is not the immediate purpose of article 30, which is simply humanitarian. In contrast, a communication under article 31 is, by definition, a claim against a sup-

posed violation of the Convention. Obviously, and independently of the outcome of the findings of the Committee, this is not what many states want to happen. At the time of writing (end of 2012) only 15 states had made the declaration on article 31.

The denouncement of alleged violations of the Convention is, by its very nature, a broader concept than the communication of an enforced disappearance. The Convention may be violated in many of its 25 normative articles, not only through an act of enforced disappearance. Besides prohibiting the crime of enforced disappearance, the Convention establishes many other obligations related to this overall aim of the Convention. It demands thorough and independent investigation of cases of enforced disappearance, even in cases where the perpetrators are not linked to state authorities; it asks states to clearly incorporate enforced disappearance as a crime in the national criminal codes, including all the elements listed in article 6 that are co-substantial for the crime, and it requires punishment adequate to the gravity of the crime, including strict rules for prescription; it sets out minimal rules for the application of universal jurisdiction, of the rules of extradition and other measures to prevent impunity. The Convention also obliges states to establish a series of preventive and protective measures for the benefit of potential victims and persons close to them, including witnesses; it prohibits the refoulement or extradition of persons in danger of enforced disappearance and provides for ample rights to know the truth. It also sets standards for the procedure in the case of detention that aim to exclude the possibility of an enforced disappearance, including far-reaching obligations in respect of information about the proceedings.

All these and other state obligations shall be a matter of the states' reports to the Committee and of the Committee's conclusions, but under article 31 they can also be motive for an individual complaint (if the state has made the declaration), enabling the Committee, after due examination of the admissibility and the substance of the claim, to make case-specific recommendations to the state concerned. Similar to the procedure under article 30, the Committee's requests and observation under article 31 are part of an open-ended communication with the states concerned, with the aim of ending the violation of the Convention in the case under consideration.

Articles 30 and 31 are thus two individual complaints mechanisms that have an obvious common goal: the prevention of enforced disappearances. However, aside

from the special requirement for the application of article 31, the specific purpose of each procedure is different. Victims and other persons concerned should therefore carefully examine the possibilities that each procedure gives. The respective guidance sheets and forms are available on the Committee's website.¹ States, on the other hand, should draw the consequences from their ratification of the Convention. It seems only logical that, once they have accepted, through ratification, the obligations contained in the

Convention, states also accept the complaint mechanism by individuals that enables the Committee to initiate an independent examination of the claims, in communication with the state authorities and with the common goal of full compliance with the Convention.

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1 <http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx>

Leonie v. Braun

8

Effective Implementation of the Convention against Enforced Disappearance in Germany

I. Introduction

Enforced disappearance remains one of the worst human rights violations, is always a crime under international law and, in certain circumstances, is defined in international law as a crime against humanity. It is not limited to military dictatorships in South America in the 1970s, but also occurs today in many parts of the world, in countries such as Mexico, Colombia and Sri Lanka. The cases of extraordinary renditions that were practiced as counter-terrorism measures over the last few years show that also Western democracies are vulnerable to such human rights violations.

The International Convention for the Protection of All Persons from Enforced Disappearance (CPED) describes what the crime means for the victims (article 1):

"Any act of enforced disappearance places the person subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing....the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life."

Costa Rica and Bosnia and Herzegovina became the latest countries to ratify the CPED bringing the total number of states parties to 32. Human rights organisations such as Amnesty International have been following the ratification and implementation process of the Convention closely.¹ In Germany, where ratification has already been accomplished, the discussion is now ongoing as to whether a specific law on implementation is required. In this contribution it is argued that German law – especially the German criminal law – does not meet the standards stipulated by the Convention. Besides legal questions arising in the areas of reparations and information rights for victims it will be necessary to introduce a specific provision on enforced disappearance in the German Criminal Code.

II. The Road to Effective Implementation of the Convention in Germany

Even though Germany was one of the first states to ratify the Convention, it has so far declined to comply with its obligation under international law to implement the treaty into national law by introducing significant changes to its national criminal and criminal procedural law. As it is known, the Convention obliges states parties to adapt their legal system to the purpose of the treaty.² In the following, this contribution will focus on those provisions of the Convention most important for its implementation in the German legal system and give the perspective of Amnesty International on the reforms most needed.

- 1 Most recently, the human rights organisation published a report called "No Impunity for Enforced Disappearances – Checklist for Effective Implementation" in November 2011, which is available in English, French, Spanish and Arabic.
- 2 Like France, The Netherlands, Belgium and Spain, among other states, Germany has now made the declarations under articles 31 and 32 of the Convention whereby states parties recognise the competence of Committee on Enforced Disappearances to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation of provisions of the Convention or by other states.

1 Definition of the Crime

Article 1 obliges states to ensure that national law absolutely prohibits enforced disappearances. Article 2 provides the elements of the definition of the crime. These four elements are:

- there is an arrest, detention, abduction or any other form of deprivation of liberty;
- that conduct is carried out by agents of the state or by persons or groups of persons acting with the authorisation, support or acquiescence of the state;
- the conduct is followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
- the placing of the disappeared person outside the protection of the law as an objective result.

Article 4 obliges states parties to take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

So far, the German government has declined to draft a law for the inclusion of the crime of enforced disappearance and to put it up for debate and adoption by the Federal Parliament (*Deutsche Bundestag*). The main argument has been that the German Criminal Code already contains sufficient legal provisions that taken together enable prosecutors to investigate and bring to court cases of enforced disappearance. However, that is not entirely true. The German Criminal Code contains a number of provisions which contain one or others of the elements also included in the definition of the Convention. These include abduction (*Freiheitsberaubung*, section 239 with the qualifications in subsections 2 to 4), hostage taking (*Erpresserischer Menschenraub*, section 239 a/ *Geiselnahme*, section 239b) and blackmail (*Erpressung*, sections 253 et seq. StGB).

However, none of these provisions covers all of the elements of the Convention's definition and thus fall short of ensuring the full prohibition of this crime under German criminal law. Enforced disappearance is a multiply-layered human rights crime. With the exception of the Inter-American Convention on the Forced Disappearance of Persons (1994) none of the universal or regional human rights treaties covers the crime. International courts such as the Inter-American Court of Human Rights had to draw on other human rights

to describe the content of the crime. The Inter-American Court developed the most extensive jurisprudence on the issue and laid the foundation for the UN's definition in the Convention. According to the Inter-American Court enforced disappearance violates a number of various human rights convention's provisions but is more than the sum of these violated rights: It is a specific or unique crime under international law. The Court also advanced the law in other related areas and recognised the right of relatives of victims to obtain information on the whereabouts of the disappeared.

The German government has also overlooked that German criminal law has no rules in place that implement article 6 of the Convention. This provision lays down that a person who deliberately withholds information from relatives of the disappeared also perpetrates the crime. Article 6 (1) b.) also establishes the principle of command responsibility for enforced disappearance, which has so far only been adopted within the context of Germany's Universal Jurisdiction Law for crimes against humanity, genocide and war crimes (*Völkerstrafgesetzbuch VStGB*).

The Convention also establishes a wider understanding of who is the victim of a crime than any of the provisions of the German Criminal Code (article 24) or the German Code of Criminal Procedure. Potential victims are not only direct family members or those who have been "disappeared" but anyone with a significantly close relationship to the disappeared person.

So far, enforced disappearance has been described as a crime only in section 7 (1) (7) of Germany's Universal Jurisdiction Law (VStGB), which is applicable only in the context of crimes against humanity. This leaves a legal gap for those cases described as "isolated cases" of enforced disappearance, i.e. which are committed outside of a widespread or systematic attack against the civilian population. For example, the cases of extraordinary renditions that were practiced by security forces in recent years can be defined as isolated disappearances, which do not reach the threshold of crimes against humanity. In these cases, terrorist suspects were arrested and detained at secret detention sites in their home countries or abroad without an arrest warrant and without being able to contact their families. In almost all cases, security forces attempted to cover their tracks and gave no information about the whereabouts of the suspects. In at least two cases, German citizens, Khaled El Masri and Mohammed Haydar Zammar, may have been victims of this practice. In the case of Zammar it is known that German investigators used his secret detention to in-

terrogate him in Syria, whilst his family had no idea where he was.

It must be noted that article 9 of the Convention puts states parties under the obligation to prosecute and punish cases of enforced disappearance based on different jurisdictional bases, including the obligation to prosecute or extradite (*aut dedere aut judicare*) - which sometimes necessarily imply universal jurisdiction. If Germany were to take this seriously, section 6 of the Criminal Code would need to be reformed to include enforced disappearance as well.

2 Statutes of Limitations

The question of statutes of limitations illustrates how important the introduction of a specific criminal provision in German law is. In German law, only murder is not subject to statutes of limitations. The provisions mentioned above are all subject to statutes of limitations. Only in qualified cases, where the victim dies or is severely harmed, can the limitation be 20 years. German law, however, regulates that the provisions on abduction and hostage-taking are so called "Dauerdelikte", i.e. the period of limitation commences only when the offence ceases. According to Amnesty International, states parties should not subject enforced disappearances to any statute of limitations when introducing a new criminal provision.

3 Reparations

Article 24 (3) and (4) of the CPED obliges states to ensure in their legal systems that they grant reparations, including financial compensation, to victims of enforced disappearance. The Convention thus takes into account the new international legal doctrine of reparations for victims of serious human rights crimes. Unfortunately, while depositing the instrument of ratification of the Convention Germany made an interpretative declaration that amounts to a prohibited reservation. Germany stated, regarding article 24 (4), that: "It is clarified that the envisaged provision on reparation and compensation does not abrogate the principle of state immunity". That statement is not a 'clarification', but a statement whereby Germany purports to exclude or to modify the legal effect of a certain provision of the treaty in their application of it - that is, a reservation.³ In addition, the German government has referred to the state liability claim ("*Amtshaftungsanspruch*" section 839 of the German Civil Code together with article 34 *Grundgesetz*), according to

which private persons can obtain financial compensation for wrongdoing by officials and administrative personnel. If it is argued, however, that the disappearance (such as an extraordinary rendition for example) was committed during armed hostilities, the legal situation is once again not clear. German courts have argued that state liability ("*Amtshaftung*") is suspended during armed conflict. This legal dogma has now been upheld in the *Distomo* decision of the ICJ with reference to state immunity. Clarification is thus needed in this legal domain as well.

4 Rights to Information

Article 18 of the CPED grants the right of access to information on detained persons to any person with a *legitimate interest* in this information, such as relatives of the persons deprived of liberty, their representatives, or their counsel. Articles 19 and 20 regulate how the information is protected and in which cases it can be restricted in accordance with the purpose of the treaty. The German government has argued that section 475 or section 406e Criminal Procedure Code sufficiently cover the right to information, but it has overlooked that these provisions are only applicable where there are ongoing criminal investigations by the police or prosecution authorities. Cases of enforced disappearance occur outside the realm of legal procedure and *habeas corpus*. The right-to-information laws in Germany are also not sufficient as they allow state agencies and offices to restrict access to information by merely referring to state secrecy dogmas.

III. Outlook

The failure of the German government to address these legal issues is unfortunate. Especially the introduction of a new specific criminal provision in the Criminal Code is necessary to address the specific nature of the crime of enforced disappearance. As Germany is an influential state party it has the political capacity and moral responsibility to show other states parties how effective national implementation can work in practice. Amnesty International will continue to lobby for an effective and compliant implementation of the Convention worldwide and hopes Germany will become a partner in this cause.

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3 See for this definition: International Law Commission, article 1.1., Guide to Practice on Reservations to Treaties, 2011.



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