

THE CONVENTION'S INNOVATIONS¹

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First of all I would like to sincerely thank the organizers of this important event for the invitation and to commend them for taking the remarkable initiative to convene this international conference, which is particularly timely. It is an honour and a pleasure for me being here today. Indeed, I also have the fortune to be among those who were here in May 2007, on the occasion of the first *journée d'études* organized by the *Centre de recherche sur les droits de l'homme et le droit humanitaire de l'Université Panthéon-Assas*. At the time, we were gathered to celebrate the opening for signature of the International Convention on the Protection of All Persons from Enforced Disappearance (“the Convention”), which had taken place three months before. Five years later, the Convention has entered into force and the Committee on Enforced Disappearances has been created and has already held two sessions. These are certainly positive achievements which we ought to celebrate. Nevertheless, for the Convention to become an effective tool of universal application much remains to be done and this conference will certainly provide us with valuable insights and inspiration to continue the struggle against enforced disappearance with renewed energy.

The Convention comes as the result of more than 30 years of struggle to adopt a universally legally binding instrument against enforced disappearance. As such, the Convention mirrors developments occurred in the meantime both in international law and jurisprudence, as well as the participation to this struggle of relatives of disappeared persons from all over the world, representatives of civil society, States and non-governmental organizations. This scenario must be taken into account when interpreting some of the provisions of the Convention, as well as some of its main features.

Back in 2000, the United Nations appointed an independent legal expert (Prof. Manfred Nowak) to examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance. In 2001 Prof. Nowak

¹ The present contribution is based on an intervention of the author on the occasion of the conference “*La Convention Internationale pour la Protection de toutes les personnes contre les disparitions forcées: les enjeux d'une mise en œuvre universelle et effective*” organized by the *Centre de recherche sur les droits de l'Homme et le droit humanitaire* (CRDH) in cooperation with the governments of France and Argentina (Paris, 15 May 2012).

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presented his report,³ whereby he highlighted the existence of a number of gaps in the legal framework. Indeed, many of the most innovative provisions of the Convention represent an attempt to fill those gaps.

Firstly, while prof. Nowak pointed out that “no specific human right not to be subjected to enforced disappearance has been recognized, although this human rights violation has occurred on a systematic scale for almost 30 years”,⁴ Article 1 of the Convention establishes an autonomous and non-derogable right not to be subjected to enforced disappearance. The existence of this innovative provision will allow the Committee on Enforced Disappearances to focus on different aspects of the States’ obligations *vis-à-vis* the prohibition of enforced disappearance and the corresponding obligation to investigate and punish those responsible, instead of having to determine which human rights are violated by the practice of enforced disappearance. In fact, the other international human rights mechanisms that dealt with cases of enforced disappearance (e.g. the Human Rights Committee, the African Commission on Human and Peoples’ Rights, the European Court of Human Rights, and the Inter-American Commission and Court of Human Rights), have to refer to different human rights treaties to construe their jurisprudence and to identify the catalogue of human rights violated in cases of enforced disappearance. In the past, this has led to sometimes contradictory results or diverging interpretations on the human rights violated by the very same phenomenon. Luckily, the Committee on Enforced Disappearances will be spared this risk.

When the Open-ended Working Group tasked with drafting and negotiating the Convention began its work, different definitions of enforced disappearance existed. In particular, the one contained in the Rome Statute for the establishment of an International Criminal Court (thus, a treaty of international criminal law) differed from the others in a number of aspects (in particular, the inclusion of “political organizations, or persons or groups of persons acting with the authorization, support or acquiescence of a political organization” among the potential perpetrators of enforced disappearances, and the requirement that the perpetrator of an enforced disappearance acts with the “intention of removing the victim from the protection of the law for a prolonged period of time”). The definition eventually included in the Convention departs from that of the Rome Statute and rather echoes those provided by the 1992 Declaration for the Protection of All Persons from Enforced Disappearance (the 1992 Declaration) and the 1994 Inter-American Convention on Forced Disappearance (the 1994

³ Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, doc. E/CN.4/2002/71 of 8 January 2002 (“Report Nowak”).

⁴ Report Nowak, para. 96.

Inter-American Convention), establishing that enforced disappearance can be committed by “agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State”. With regard to the “placement of the victim outside the protection of the law”, the formula chosen in the Convention was voluntarily left quite vague (in an exercise defined as “constructive ambiguity”), in order to allow some margin of discretion in interpreting whether this has to be seen as a consequence or as a constitutive element of the crime. In any case, any reference to temporal elements such as the questionable phrase “prolonged period of time” contained in the Rome Statute were eventually left out from the Convention. This must be seen as an attempt to encourage an interpretation of the definition of enforced disappearance that is most conducive to the protection of all persons from such a heinous practice.

Certainly, the inclusion or non-inclusion of non-State actors among the possible perpetrators of enforced disappearance was one of the most debated issues throughout the whole process of negotiation of the Convention. Article 3 sets forth the obligation of States Parties to “take appropriate measures to investigate act of the same nature of enforced disappearance committed by non-State actors and bring those responsible to justice” and it certainly represents a sound novelty in international human rights law. In this sense, the Committee on Enforced Disappearances has a crucial role to play in the interpretation of this provision and in spelling out the corresponding States’ obligations.

Impunity in cases of enforced disappearance is unfortunately rampant and it is reported as a matter of deep concern from different countries in the world. In this light, Articles 4, 6 and 7 (that spell out the obligation of the State to codify enforced disappearance as a separate and autonomous crime under domestic criminal legislation), together with Articles 9 to 11 (that set forth the obligation of the States Parties to establish a sort of universal jurisdiction against those responsible for enforced disappearance who are to be found in their territory and spells out the principle “*aut dedere aut juricare*” in cases of enforced disappearance), represent a significant step forward and, if duly implemented, will constitute a solid bulwark against impunity.

Articles 14 and 15 of the Convention provide for an enhanced scheme of cooperation and legal assistance among States Parties in the investigation and sanction of those responsible for enforced disappearance, as well as for the searching, locating and releasing of disappeared persons. This is of the utmost importance, given that often enforced disappearance assumes a transnational scope, as we saw in the past in the infamous “Operation Cóndor” and, more

recently, in the programmes of extra-ordinary renditions in which many States, including European countries, were involved.

One of the most innovative features of the Convention are the provisions concerning the prevention of enforced disappearance. In particular, Articles 17 to 19, whose inclusion in the Convention is highly due to the contributions of the International Committee of the Red Cross during the negotiations, concern in general all persons deprived of their liberty and establish a number of guarantees that, if duly implemented, can in fact contribute to save human lives. In fact, these provisions set forth that “no one shall be held in secret detention”, spell out a number of guarantees for persons deprived of their liberty (among others, the “guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family or counsel”) and the corresponding obligations of the States Parties (among others, the compilation and maintenance of one or more up-to-date official registers and records of persons deprived of liberty, containing some core information on the detainees, which shall be made promptly available to any judicial or other competent authority). Moreover, States Parties shall guarantee access to core information on detainees to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel.

Article 24 is undisputedly the corner-stone of the whole Convention. First, it embraces a wide notion of “victim” of the crime, establishing that it is not only the disappeared person, but also any individual who has suffered harm as the direct result of the enforced disappearance. Second, for the first time in international human rights law, it spells out the “right to know the truth” of victims with regard to the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared persons. Third, anew as a *première* in international human rights law, it provides that, in case of death of the disappeared person, States must take all appropriate measures to “locate, respect and return their remains”. Fourth, the notion of “reparation” to be granted to victims of enforced disappearance is not limited to pecuniary compensation, but includes restitution, rehabilitation, satisfaction and guarantees of non-repetition. This provision is 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.⁵ The interpretation that the Committee on Enforced Disappearances will give to

⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution No. 60/147 of 16 December 2005.

this provision 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 that, so far, also in cases of enforced disappearance, has refused to award measures of reparation other than the sole pecuniary compensation. Moreover, building upon the concrete experiences of victims of enforced disappearance, Article 24 of the Convention establishes that States must take all necessary measures to regulate the “legal status” of the disappeared person and his or her family, and guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances.

Article 25 of the Convention represents a significant development if compared to Article 20 of the 1992 Declaration and the appalling silence on this subject of the 1994 Inter-American Convention (even though it is worth mentioning that the Inter-American Court of Human Rights has developed a sound and articulated jurisprudence on the enforced disappearance of minors, in particular in cases referring to El Salvador, Guatemala and Uruguay). In fact, Article 25 of the Convention provides an extremely comprehensive response to the phenomena of wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother, and the falsification, concealment or destruction of documents concerning the true identity of the mentioned children. Indeed, Article 25, among other measures, provides that States that recognize a system of adoption shall have legal procedures in place to review the adoption procedure and, where appropriate, to annul any adoption that originated in an enforced disappearance.

Finally, other considerable innovations brought forward by the Convention are related to the mandate entrusted to the Committee on Enforced Disappearances and its powers. In particular, the urgent action procedure pursuant to Article 30; the power to carry out country visits pursuant to Article 33; and the potential referral of information concerning the practice of enforced disappearance on a widespread or systematic basis in a given country to the General Assembly of the United Nations through the Secretary-General, are indisputably a novelty in the landscape of United Nations treaty bodies (Article 34). I leave the in-depth analysis of these provisions to other distinguished speakers.

To conclude, it is worth recalling the words pronounced on 27 June 2006 by the late French Ambassador Kessedjian in his speech of presentation of the Convention to the Human Rights Council: “[...] *Je vous demande de faire de ce grand espoir d’hier, une réalité pour demain*”.

The entry into force of the Convention and the beginning of the work of the Committee on Enforced Disappearances represent a step towards such a reality. Nevertheless, as mentioned at the beginning of my intervention, much remains to be done. Civil society, organizations of relatives of disappeared people, non-governmental organizations, States, experts, scholars and, in general, all people of good will have a role to play in the realization of the hope to build a world genuinely free from enforced disappearance.