

**WHEN IS IT ENOUGH?  
ENFORCED DISAPPEARANCE AND THE “TEMPORAL ELEMENT”**

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**Résumé :**

Les 30 dernières années, différents instruments juridiques internationaux ont établi une définition de la disparition forcée. Alors qu'il existe à cet égard un accord général sur trois éléments constitutifs (privation de la liberté contre la volonté de la personne concernée ; implication d'agents étatiques, au moins indirectement par acquiescement; refus de reconnaître la privation de la liberté ou dissimulation du sort réservé à la personne disparue ou du lieu où elle se trouve), certains estiment qu'il y aurait d'autres éléments constitutifs, comme ce qui est parfois désigné comme l'« élément temporel », c'est à dire la prise en compte de la durée prolongée de la disparition ou de la soustraction de la victime à la protection de la loi.

Cette contribution analyse les instruments juridiques internationaux et la jurisprudence en la matière. Elle met particulièrement l'accent sur les constatations rendues en mars 2012 par le Comité des Droits de l'Homme dans l'affaire *Aboufaied c. Libye* et les opinions séparées qui y ont été jointes par certains membres du Comité allant dans le sens de l'existence de cet « élément temporel ». Cette contribution vise à démontrer que le droit international des droits de l'Homme ne requiert aucun élément temporel, en sus des trois éléments constitutifs précédemment mentionnés, pour qu'une situation soit qualifiée de disparition forcée.

**Abstract :**

During the past 30 years different international legal instruments have incorporated a definition of enforced disappearance. While there is a general agreement on three cumulative constitutive elements (deprivation of liberty against the will of the person concerned; involvement of governmental officials, at least indirectly by acquiescence; and refusal to acknowledge the deprivation of liberty or concealment of the fate and whereabouts of the person concerned), some argue that there may be additional constitutive elements, such as a so-called “temporal element”, that is the prolonged duration of the disappearance or the prolonged duration of the placement of the victim outside the protection of the law.

In this contribution, international legal instruments and jurisprudence on the matter are analysed. In particular, reference is made to the views rendered in March 2012 by the Human Rights Committee in the case *Aboufaied v. Libya* and the separate opinions attached by some of the members of the Committee, arguing in favour of the existence of the mentioned “temporal element”. This contribution aims at demonstrating that international human rights law does not require any temporal element to qualify an act that meets the three mentioned constitutive elements as an enforced disappearance.

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## I. – Introduction

Over the past 30 years international human rights mechanisms have frequently been called to consider cases of enforced disappearance and have developed a rather comprehensive, although not always homogeneous, jurisprudence. During almost the same time-span different international legal instruments have incorporated a definition of enforced disappearance, spelling out its constitutive elements and including it, under certain circumstances, among crimes against humanity.

It is now a well-established principle that enforced disappearance is a complex form of human rights violation that requires a *sui generis* regime and must be understood and confronted in an integral manner. It is unanimously recognized as a multiple and continuous violation of many human rights. Some of the violations, such as those related to 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 and degrading treatment, are inherent to any case of enforced disappearance. Other violations, such as that of the right to life, depend on the specific circumstances.<sup>2</sup>

Coming to the definition of enforced disappearance, there is a general agreement on three cumulative constitutive elements, that is: deprivation of liberty against the will of the person concerned; involvement of governmental officials, at least indirectly by acquiescence; and refusal to acknowledge the deprivation of liberty or concealment of the fate and whereabouts of the person concerned. However, some argue that there may be additional constitutive elements, such as the placement of the disappeared person outside the protection of the law, or a so-called “temporal element”, that is the prolonged duration of the disappearance or the prolonged duration of the placement of the victim outside the protection of the law.

Analysing the existing definitions of enforced disappearance in international law, as well as international jurisprudence, in particular the recent views delivered by the Human Rights Committee in the case *Aboufaied v. Libya*,<sup>3</sup> and the different interpretations and approaches so far undertaken, this article argues that international human rights law does not require any temporal element to qualify an act that meets the above-mentioned three constitutive elements as an enforced disappearance.

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<sup>2</sup> This contribution will not focus on the number of human rights violated by enforced disappearance as spelled out in international jurisprudence, but will refer to some of them – in particular the right to life and the right to recognition as a person before the law – in relation to the existence of a presumed temporal element in enforced disappearance.

<sup>3</sup> Human Rights Committee (hereinafter HRC), Case *Aboufaied v. Libya* (Communication No. 1782/2008), views of 21 March 2012.

## II. – The Definition of Enforced Disappearance in International Law and the “Temporal Element”

While multi-offensive in its nature, enforced disappearance has a unitary character, which cannot be segmented in different fragments and must be reflected in a specific definition. Four definitions of enforced disappearance may today be found in international instruments.

The first international legal instrument, although of a non-binding nature, to provide a definition of enforced disappearance is the 1992 Declaration on the Protection of All Persons from Enforced Disappearance (“the 1992 Declaration”),<sup>4</sup> that in its preamble sets forth the following: “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 organized 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*” (emphasis is added).

This definition includes the already mentioned three constitutive elements. What is characteristic of enforced disappearance is the refusal to acknowledge the deprivation of liberty and the concealment of the fate and whereabouts of the disappeared person. The breach of an international obligation already occurs when the said refusal or concealment takes place, and then continues until the fate and whereabouts of the disappeared person are established with certainty. Looking at the concepts used by the International Law Commission in the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, the breach has a composite character, in the sense that it starts not at the moment of the deprivation of liberty, but at the subsequent moment of the refusal to acknowledge such deprivation or of the concealment of the fate and whereabouts of the disappeared person.<sup>5</sup> Moreover, the breach has a continuous nature in the sense that it lasts for a certain period of time, which can be either short or long, depending on the specific circumstances. But the breach has no predetermined duration. If the State has today the obligation to disclose that a deprivation of liberty took place, the enforced disappearance occurs even if the disclosure is made tomorrow. Every secret detention is also an instance of enforced disappearance.

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<sup>4</sup> General Assembly Resolution A/RES/47/133 of 18 December 1992, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/47/133&Lang=E&Area=RESOLUTION](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/47/133&Lang=E&Area=RESOLUTION).

<sup>5</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its 53<sup>rd</sup> Session (doc. A/56/10) and annexed to General Assembly Resolution A/RES/56/83 of 12 December 2001, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/56/83&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/56/83&Lang=E). See, in particular, Articles 14 and 15.

Rather than the duration, which is irrelevant to establish the existence of an enforced disappearance, what matters in cases of enforced disappearance are two factors. First, the critical moment, that is the moment when the State is under an obligation to disclose that a deprivation of liberty took place. This is usually established by domestic legislation and is normally measured in hours. It may coincide with the moment when the person deprived of liberty is brought before a judge or another authorized officer and is entitled to communicate with his or her legal counsel. Indeed, any determination of the critical moment made by domestic legislation is subject to the scrutiny of international law. In no case international human rights law allows a State to prolong for an unreasonable or excessive time a disclosure that must be done promptly. Second, it is important to determine to whom the information on the deprivation of liberty must be disclosed. Those entitled to receive such information are the relatives of the person deprived of liberty, as well as their representatives or their counsels. In fact, the victim of an enforced disappearance is not only the disappeared person, but also any individual who has suffered harm as the direct result of the disappearance, typically including relatives.<sup>6</sup>

In the definition of enforced disappearance provided by the 1992 Declaration, the placement of the disappeared person outside the protection of the law is clearly understood as a consequence of a human rights violation and not as an additional constitutive element of such violation.

The second relevant international legal instrument that provides a definition of enforced disappearance is the Inter-American Convention on Forced Disappearance of Persons (“the 1994 Inter-American Convention”). Article II reads as follows: “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 authorization, 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*” (emphasis is added). While the wording is different, there is no significant departure from the definition provided by the 1992 Declaration.

A different definition of enforced disappearance is included in the Rome Statute for the Establishment of an International Criminal Court (“the 1998 Rome Statute”). Article 7, para. 1 (i), includes enforced disappearance of persons among crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Article 7, para. 2 (i), defines the crime as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of

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<sup>6</sup> See Article 24, para. 1, of the International Convention on the Protection of All Persons from Enforced Disappearance.

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*” (emphasis is added).

Notably, the 1998 Rome Statute includes, as an additional element, the intention of removing the disappeared person from the protection of the law for a prolonged period of time.

However, having been drafted from the angle of international criminal law, this definition differs from the previous ones, which pertain to international human rights instruments, and is arguably narrower.<sup>7</sup> While international human rights law instruments aim at establishing whether a State violates certain fundamental rights of a person, an instrument of international criminal law aims at determining whether an accused is guilty for a certain crime. Given its nature, it is understandable that the 1998 Rome Statute elaborates on the element of intentionality (what is required is, in fact, the intention of the perpetrator to place the disappeared person outside the protection of the law for a prolonged period of time). Nevertheless, the wording “for a prolonged period of time” remains extremely vague and has not escaped criticism.<sup>8</sup> The elements of crimes that shall assist the International Criminal Court in the interpretation of Article, 7, para. 2 (i), of the 1998 Rome Statute, do not shed light on this particular aspect, as they merely reiterate the requirement that “the perpetrator intended to remove such person or persons from the protection of the law *for a prolonged period of time*”.

In this regard, the independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances (Prof. Manfred Nowak) affirmed that: “[...] international criminal law seems to define enforced disappearances in a very narrow manner which can only be applied in truly exceptional circumstances. Apart from the general requirement of crimes against humanity, which only covers acts committed as part of a widespread or systematic attack against a civilian population, perpetrators can only be convicted if the prosecutor establishes that they ‘intended to remove the victims from the protection of the law for a prolonged period of time’. This is a subjective element in the definition, which in practice will be difficult to prove. The perpetrators usually only intend to abduct the victim without leaving any trace in order to bring him (her) to a secret place for the purpose of interrogation, intimidation, torture or instant but secret assassination. Often many perpetrators are involved in the abduction and not everybody knows what the final fate of the victim will be. [...]”.<sup>9</sup>

<sup>7</sup> See, among others, OTT (L.), *Enforced Disappearance in International Law*, Intersentia, 2011, pp. 15-30; and VERMEULEN (M.L.), *Enforced Disappearance – Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Intersentia, 2012, pp. 56-58.

<sup>8</sup> See, among others, CITRONI (G.) and SCOVAZZI (T.), *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden, Martinus Nijhoff Publishers, 2007, pp. 273-278.

<sup>9</sup> Commission on Human Rights, *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*, doc. E/CN.4/2002/71 of 8 January 2002 (hereinafter Report Nowak), para. 74., available at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3e140ed64e7c6a83c1256b9700513970/\\$FILE/G0210026.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3e140ed64e7c6a83c1256b9700513970/$FILE/G0210026.pdf).

The fourth instrument that defines enforced disappearance is the International Convention for the Protection of All Persons from Enforced Disappearance (“the 2007 Convention”). Article 2 sets forth that “enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, *which place such a person outside the protection of the law*” (emphasis is added).

The introduction of a temporal element brought forward by the 1998 Rome Statute was taken into account when drafting the 2007 Convention in order to decide whether to reproduce it in the definition of enforced disappearance to be included in the new treaty.<sup>10</sup> While some delegations expressed regret that the proposed definition differed in some respects from that set out in the 1998 Rome Statute, the majority considered that the definition should be adapted to the different nature and purpose of the legal instrument they were drafting. While the purpose of Article 7 of the 1998 Rome Statute was to grant the International Criminal Court the power to hear cases involving enforced disappearances which constituted crimes against humanity, the purpose of the 2007 Convention, “in contrast, was to offer the broadest possible protection for all persons against enforced disappearances, including those which did not constitute crimes against humanity. A wider definition would help in achieving the objective”.<sup>11</sup>

Some delegations considered that the definition of enforced disappearance should contain a reference to removal from the protection of the law “for a prolonged period of time”, because in their view this would have satisfied “the need to allow a certain amount of time to elapse between arrest and notification of the detention”.<sup>12</sup> However, the majority of the delegations pointed out that “an enforced disappearance could be carried out from the moment of arrest, if there was a refusal to acknowledge the deprivation of liberty. The definition of enforced disappearances would also be less precise, owing to the vague and unspecific nature of the expression ‘prolonged period’. Several participants, emphasizing the new instrument’s aim of prevention and early warning, considered that it was important to confer on the persons concerned and the national and

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<sup>10</sup> See *Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, doc. E/CN.4/2003/71 of 12 February 2003, para. 36, available at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/0cd75c3312ebfc92c1256cef00353055/\\$FILE/G0310943.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/0cd75c3312ebfc92c1256cef00353055/$FILE/G0310943.pdf); *Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, doc. E/CN.4/2005/66 of 10 March 2005, para. 24, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/128/31/PDF/G0512831.pdf?OpenElement>. On the definition of enforced disappearance provided by the 2007 Convention see also DE FROUVILLE (O.), *La Convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées: les enjeux juridiques d’une négociation exemplaire – Première partie: les dispositions substantielles*, in *Droits Fondamentaux*, n° 6, janvier-décembre 2006, available at: <http://www.droits-fondamentaux.org/spip.php?article119>.

<sup>11</sup> See *Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, doc. E/CN.4/2004/59 of 23 February 2004, paras. 17-18, available at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3061c868d1e06422c1256e6d003d6f10/\\$FILE/G0411045.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3061c868d1e06422c1256e6d003d6f10/$FILE/G0411045.pdf).

<sup>12</sup> *Ibid.*, para. 22.

international monitoring bodies the ability to intervene as soon as the deprivation of liberty began, without the need to wait for a certain period to elapse”.<sup>13</sup>

Eventually, the decision was taken to leave out any temporal element from the definition of enforced disappearance included in the 2007 Convention, as this would offer the broadest protection from this heinous crime.

During the negotiations of the 2007 Convention another subject of discussion was whether, even without any temporal element, the “placement outside the protection of the law” of the victim was to be considered as a constitutive element of the human rights violation or rather a consequence.<sup>14</sup> The wording eventually chosen is voluntarily vague on this aspect. The late Ambassador Bernard Kessedjian, Chairperson of the Working Group charged with drafting the 2007 Convention referred to this as a “constructive ambiguity”, highlighting that the adopted formula gave legislators the option if interpreting the reference to a person being placed outside the protection of the law as an integral part of the definition or not. He also recalled that States were fully entitled to make an interpretative declaration on the matter at the time of ratification.<sup>15</sup> At the time of writing, none of the States parties to the 2007 Convention has made an interpretative declaration on this particular matter.

From the drafting history of the four relevant international legal instruments it can basically be inferred that the 1992 Declaration, the 1994 Inter-American Convention and the 2007 Convention, on the one hand, and the 1998 Rome Statute, on the other, operate in different contexts and that it would be a mistake to adapt to human rights law a definition drafted for international criminal law, and vice versa.

This conclusion is confirmed by the practice of international human rights mechanisms. A joint study on global practices in relation to secret detention in the context of countering terrorism, issued by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances (“WGEID”), makes clear that the definition of enforced disappearance contained in Article 2 of the 2007 Convention “[...] *does not require intent* to put the person concerned outside the protection of the law as a defining element, but rather refers to it as *an objective consequence* of the denial, refusal or

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<sup>13</sup> *Ibid.*, para. 23.

<sup>14</sup> See doc. E/CN.4/2004/59, *loc. cit.*, paras. 24-26. See also doc. E/CN.4/2005/66, *loc. cit.*, para. 23; *Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, doc. E/CN.4/2006/57 of 2 February 2006, paras. 91-96, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/105/61/PDF/G0610561.pdf?OpenElement>.

<sup>15</sup> See doc. E/CN.4/2006/57, *loc. cit.*, para. 93.

concealment of the whereabouts and fate of the person. [...]”<sup>16</sup> Accordingly, secret detention, no matter how long it lasts, is equated to an instance of enforced disappearance and “[...] involving the denial or concealment of a person’s detention, whereabouts or fate has the *inherent consequence* of placing the person outside the protection of the law”.<sup>17</sup>

In its 30 years of experience, the WGEID has had the opportunity to pronounce itself on the so-called “temporal element” of enforced disappearance as well as on whether the “placement of the victim outside the protection of the law” is a constitutive element or a consequence of the human rights violation.

In its general comment of 2007 on the definition of enforced disappearance, 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. Therefore, the Working Group admits cases of enforced disappearance *without requiring* that the information whereby a case is reported by a source *should demonstrate, or even presume, the intention of the perpetrator to place the victim outside the protection of the law*”.<sup>18</sup>

The WGEID expressly discards the existence of any temporal element linked to the deprivation of liberty of a victim of enforced disappearance, when affirming that it “[...] considers that when the dead body of the victim is found mutilated or with clear signs of having been tortured or with the arms or legs tied, those circumstances clearly show that the detention was not immediately followed by an execution, but that *the deprivation of liberty had some duration, even of at least a few hours or days*. A situation of such nature, not only constitutes a violation to the right not to be disappeared, but also to the right not to be subjected to torture, to the right to recognition as a person before the law and to the right to life, as provided under article 1.2 of the Declaration”.<sup>19</sup>

In its study of 2010 on best practices on enforced disappearance in domestic criminal legislation, the WGEID recalled that any act of enforced disappearance is characterized by three cumulative minimum elements, that is “a) deprivation of liberty against the will of the person concerned; b) involvement of government officials,

<sup>16</sup> Doc. A/HRC/13/42 of 19 February 2010, para. 28 (emphasis is added), available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>.

<sup>17</sup> *Ibid.*, para. 36 (emphasis is added).

<sup>18</sup> WGEID, *General Comment on the Definition of Enforced Disappearance*, 2007, para. 5 (emphasis is added). The integral text of the general comment can be found in doc. A/HRC/7/2 of 10 January 2008, para. 26, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/05/PDF/G0810105.pdf?OpenElement>.

<sup>19</sup> *Ibid.*, para. 9 (emphasis is added).



at least indirectly by acquiescence; c) refusal to disclose the fate and whereabouts of the person concerned”.<sup>20</sup> No mention is made to any alleged temporal element of the crime.

The WGEID also highlighted that “all definitions of enforced disappearance in international law indicate that the victim is placed outside the protection of the law. This peculiarity of enforced disappearance entails the suspension of the enjoyment of all other human rights and freedoms of the victim and places him or her in a situation of complete defencelessness. This is strictly related to the right of everyone to be recognized as a person before the law, which is a prerequisite to enjoy all other human rights”.<sup>21</sup> The WGEID held that the placement outside the protection of the law of the victim of an enforced disappearance is a consequence rather than a constitutive element of the crime<sup>22</sup> and declared that “good practices come from those States that include this element of ‘placement of the victim outside the protection of the law’ as a *consequence* of the other constitutive elements, in conformity with the Declaration and the position of the Working Group”.<sup>23</sup>

### III. – The Temporal Element and the Violation of the Right to Life in Cases of Enforced Disappearance

In light of the above, it would seem that there is a general agreement in the determination of the constitutive elements of an enforced disappearance, intended as a violation of human rights. However, from time to time, the issue of the potential existence of a “temporal element” in enforced disappearance, although declined in different manners, has been evoked within international human rights mechanisms. Usually, the application of a temporal limitation or criterion to define enforced disappearance as such or to declare violations of specific human rights involved in an enforced disappearance – such as the right to life or the right to recognition as a person before the law – is eventually disregarded as being vague and inadequate. While, in the case of the Inter-American Court of Human Rights the possible existence of a temporal element has

<sup>20</sup> WGEID, *Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation*, doc. A/HRC/16/48/Add.3 of 28 December 2010, para. 21, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-48-Add3.pdf>. The same interpretative approach on the constitutive elements of the crime has been held by the Inter-American Court of Human Rights. See, among others, Inter-American Court of Human Rights, Case *Gómez Palomino v. Peru*, Ser. C No. 136, judgment of 22 November 2005, para. 97.

<sup>21</sup> WGEID, *Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation*, *loc. cit.*, para. 29.

<sup>22</sup> The WGEID partially contradicted its long-lasting interpretation of the “placement of the victim outside the protection of the law” as a consequence of the crime in its *General Comment on the right to recognition as a person before the law in the context of enforced disappearances*, 2011 (the integral text of the general comment is reproduced in *Annual Report for 2011*, doc. A/HRC/19/58/Rev. 1 of 2 March 2012, para. 42, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A%2FHRC%2F19%2F58%2FRev.+1&Submit=Search&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A%2FHRC%2F19%2F58%2FRev.+1&Submit=Search&Lang=E)). In the preamble of the said general comment the WGEID refers to the placement of the victim outside the protection of the law as “one of the elements of the legal definition of enforced disappearance”, and at para. 1 as “one of the constitutive elements of enforced disappearances”.

<sup>23</sup> WGEID, *Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation*, *loc. cit.*, para. 32 (emphasis is in the original text). See also para. 62 (d). In the same sense see Inter-American Court of Human Rights, Case *Chitay Nech v. Guatemala*, Ser. C No. 212, judgment of 25 May 2010, para. 99.

never been called into play, the European Court of Human Rights has in a number of cases discussed the matter with results that do not seem straightforward.

In the first judgments delivered on cases of enforced disappearance, the European Court, in order to declare a violation of the substantive limb of Article 2 (right to life) of the European Convention on Human Rights, attached importance to the time elapsed since the victim had been seen alive for the last time in life-threatening circumstances in the hands of State agents.<sup>24</sup> The Court declared that “the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. [...]”<sup>25</sup>

The above reasoning, which does not seem to adequately address the nature of enforced disappearance or the necessity to revert the burden of proof in favour of the applicants,<sup>26</sup> brought the Court to some unwarranted speculations. In the *Kurt* case, where the victim had been subjected to enforced disappearance for four and a half years before the Court’s judgment, the period of time elapsed was not considered enough to declare a violation of the right to life.<sup>27</sup> In a subsequent case where six and a half years had passed between the disappearance and the Court’s judgment, this lapse was qualified as “a period markedly longer than the four and a half years between the taking into detention of the applicants’ son and the Court’s judgment in the *Kurt* case”.<sup>28</sup> Accordingly, the Court found a violation of Article 2 of the Convention. While the result achieved is certainly to be subscribed, the reasoning followed, based on time considerations is a slippery one. If four and a half years are not enough to presume the violation of the right to life of a victim of enforced disappearance and six and a half are, where should the line be drawn? Would five and a half be enough? What the European Court failed to see was that the context in which the said enforced disappearance took place. The duration of the period during which information about the victim is lacking is not relevant. What matters is the fact that the State, which should know the fate and whereabouts of the victim, denies this information to the relatives.<sup>29</sup> This entails a reversal of the burden of proof.

<sup>24</sup> In general, on the jurisprudence of the European Court of Human Rights in cases of enforced disappearance, see DECAUX (E.), *La jurisprudence de la Cour Européenne des droits de l’homme et les disparitions forcées*, in *Mélanges en l’honneur de Vincent Berger*, to be published.

<sup>25</sup> European Court of Human Rights, Case *Timurtas v. Turkey*, judgment of 13 June 2000, para. 82.

<sup>26</sup> The Inter-American Court of Human Rights reverted the burden of proof in cases of enforced disappearance since its very first judgment on the subject. See Inter-American Court of Human Rights, Case *Velásquez Rodríguez v. Honduras*, Ser. C No. 4, judgment of 29 July 1988, para. 80. The Human Rights Committee applies a similar reasoning, see *infra* para. V.

<sup>27</sup> European Court of Human Rights, Case *Kurt v. Turkey*, judgment of 25 May 1998, para. 106.

<sup>28</sup> European Court of Human Rights, Case *Timurtas v. Turkey*, judgment of 13 June 2000, para. 84.

<sup>29</sup> See CITRONI (G.) and SCOVAZZI (T.), *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, *op. cit.*, pp. 197-198.

Given the ambiguous nature of the criterion invoked, the European Court soon found itself in contradiction. In a case where 27 years had elapsed between the victims of disappearance were last seen alive and the relevant judgment, the Court did not find a violation of the substantive limb of Article 2 of the Convention.<sup>30</sup> However, if six years and a half is markedly longer than four and a half, 27 undisputedly outnumbers four and a half. Evidently, the time factor is not a solid criterion to build upon the jurisprudence on the violation of the right to life in cases of enforced disappearance. In fact, without ever openly questioning it and continuing to hold that “the lapse of time since the person was seen alive or heard from is a relevant element”,<sup>31</sup> the European Court of Human Rights avoided entering into mathematics again and in its more recent judgments on the subject rather focuses on the specific circumstances surrounding the victims’ disappearance to declare a violation of the substantive limb of the right to life.<sup>32</sup>

#### **IV. – The Temporal Element and the Violation of the Right to Recognition as a Person before the Law in Cases of Enforced Disappearance**

A second instance where the temporal element has been evoked in cases of enforced disappearance is in relation to the violation of the right to recognition as a person before the law. Before entering into the substance of the matter, some elaboration on the relevance of this fundamental right in cases of enforced disappearance may be needed.

Article 1, para. 2, of the 1992 Declaration provides that “any act of enforced disappearance *places the persons 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, inter alia, 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” (emphasis is added).

After a number of cases where it did not consider it necessary to deal with the complaints in respect of Article 16 of the International Covenant on Civil and Political Rights (right to recognition as a person before the law),<sup>33</sup> the Human Rights Committee was the first one among the international human rights mechanisms that have dealt with cases of enforced disappearance to eventually declare that, among several other provisions, this practice may also entail a violation of the right to recognition as a person before the law.<sup>34</sup>

<sup>30</sup> European Court of Human Rights, Case *Cyprus v. Turkey*, judgment of 10 May 2001.

<sup>31</sup> European Court of Human Rights, Case *Aslakhanova and others v. Russia*, judgment of 18 December 2012, para. 100.

<sup>32</sup> *Ibid.*, paras. 100-101.

<sup>33</sup> See, among others, HRC, Case *Boucherf v. Algeria* (Communication No. 1196/2003), views of 30 March 2006, para. 9.8.

<sup>34</sup> HRC, Case *Kimouche v. Algeriai* (Communication No. 1328/2004), views of 10 July 2007, paras. 7.8 and 7.9. See also HRC, Case *Grioua v. Algeria* (Communication No. 1327/2004), views of 10 July 2007, paras. 7.8 and 7.9.

The European Court of Human Rights did not have the opportunity to pronounce itself on this aspect because neither the European Convention on Human Rights or its Additional Protocols explicitly include the right to recognition as a person before the law.<sup>35</sup>

In its rich jurisprudence on cases of enforced disappearance, the Inter-American Court of Human Rights was frequently requested to declare also a violation of Article 3 of the American Convention on Human Rights, which provides that “every person has a right to recognition as a person before the law”. However, in a number of judgments the Court did not consider this provision to be violated, holding that “[...] the Inter-American Convention on Forced Disappearance of Persons does not expressly refer to the juridical personality among the elements that typify the complex crime of forced disappearance of persons. Furthermore, the Tribunal has indicated that said right has its own juridical content, that is, the right every person has to be recognized everywhere as a person having rights and obligations, in this regard, the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligations. [...]”<sup>36</sup>

However, the Court reversed its previous approach in the landmark judgment delivered on 22 September 2009 on the case *Anzualdo-Castro v. Peru*, whereby it affirmed that “[...] given the multiple and complex nature of this serious human right violation, the Tribunal reconsiders its previous position and deems it is possible that, in this type of cases, the forced disappearance may entail a specific violation of said right: despite the fact that the disappeared person can no longer exercise and enjoy other rights, and eventually all the rights to which he or she is entitled, his or her disappearance is not only one of the most serious forms of placing the person outside the protection of the law but it also entails to deny that person's existence and to place him or her in a kind of limbo or uncertain legal situation before the society, the State and even the international community”<sup>37</sup>. Further, the Court held that “[...] one of the characteristics of forced disappearance [...] is that it implies the State's refusal to acknowledge that the victim is under its custody and provide information in that regard, in order to create uncertainty as to his whereabouts, life or death and cause intimidation”<sup>38</sup>. The Inter-American Court clarified that several international treaties recognize the possible violation of the right to recognition as a person before the law in enforced disappearance cases “[...] by relating it to the consequent lack of protection before the law of the individual, as a result of his or her abduction or deprivation of liberty and subsequent denial or lack of information on the part of the state

<sup>35</sup> Notably, Article 5 of the African Charter on Human and Peoples' Rights provides that “every individual shall have the recognition of his legal status”. However, at the time of writing, neither the African Commission nor Court on Human and Peoples' Rights have analysed in-depth the subsistence of a violation of this particular right in cases of enforced disappearance.

<sup>36</sup> Inter-American Court of Human Rights, Case *Ticona Estrada v. Bolivia*, Ser. C No. 191, judgment of 27 November 2008, para. 89. See also Case *Bámaca Vélasquez v. Guatemala*, Ser. C No. 70, judgment of 25 November 2000, paras. 179-180.

<sup>37</sup> Inter-American Court of Human Rights, Case *Anzualdo-Castro v. Peru*, Ser. C No. 202, judgment of 22 September 2009, para. 90.

<sup>38</sup> *Ibid.*, para. 91.

authorities. [...]”<sup>39</sup> Notably, the Court explicitly related the violation of the right to recognition as a person before the law to the victim’s deprivation of liberty – no matter how long does such deprivation last -, followed by the denial or lack of information on the fate and whereabouts of the victim on the part of State’s authorities.

In the judgment, the Inter-American Court summarized the case law of the Human Rights Committee on this matter: “The Human Rights Committee has recognized, in turn, that the forced disappearance may amount to a violation of the right to juridical personality in light of the following aspects: a) the forced disappearance deprived the individuals of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State; b) if the State failed to conduct a thorough investigation into the fate of disappeared person or provided the author with any effective remedy; and c) the forced disappearance places the disappeared person outside the protection of the law”<sup>40</sup> Similarly, the Court noted that “[...] the Inter-American Commission has, in several precedents, constantly considered that the persons who were detained and then disappeared ‘were excluded from the legal and institutional framework of the State’, which constituted the negation of their very existence as human beings recognized as persons before the law, and as a result, it has declared the violation of Article 3 of the Convention”<sup>41</sup>.

In light of the above, the Inter-American Court concluded that “[...] in cases of forced disappearance of persons, the victim is placed in a situation of legal uncertainty that prevents, impedes or eliminates the possibility of the individual to be entitled to or effectively exercise his or her rights in general, in one of the most serious forms of non-compliance with the State’s duties to respect and guarantee human rights”<sup>42</sup>.

Judge Sergio García Ramírez attached a concurring opinion to the judgment, whereby he admitted that, before joining his colleagues in finding a violation of the right to recognition as a person before the law, he had to overcome some doubts. None of such doubts was related to the existence of an alleged temporal element of the enforced disappearance concerned. According to Judge García Ramírez, “in order to assess whether there is a violation of Article 3, it is essential to observe the current descriptions on forced disappearance: do they include the violation of the right to juridical personality? It is then crucial to establish the situation in which such violation would occur, that is to say, to establish what the juridical personality is, in the first place, and what said right to personality implies, in the second place”<sup>43</sup> Further, he specified that

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<sup>39</sup> *Ibid.*, para. 92.

<sup>40</sup> *Ibid.*, para. 97.

<sup>41</sup> *Ibid.*, para. 99.

<sup>42</sup> *Ibid.*, para. 101.

<sup>43</sup> Inter-American Court of Human Rights, Case *Anzualdo-Castro*, *supra* note 37, concurring opinion of Judge Sergio García Ramírez, para. 23.

“in order to ensure that such violation exists, considering the nature of the forced disappearance, it is necessary to define, as I said before, what is the right to juridical personality. It has been generally understood – as the Inter-American Court has deemed – that the juridical personality implies the capacity of the individual to be entitled to legal rights and obligations. That being the case, the recognition of juridical personality implies the affirmation that an individual has said capacity. The right to recognition entails the possibility of demanding the recognition of the capacity to be entitled to rights and obligations”.<sup>44</sup> In the reconstruction of the reasoning followed by the Inter-American Court of Human Rights, Judge García Ramírez pointed out that the “[...] connection between forced disappearance and the violation of Article 3 of the American Convention constitutes a piece of information about the evolution of the international law on human rights and [the Court] analyses the disregard of the juridical personality by reference to the possibility/impossibility of exercising right. In this aspect, the Judgment of the case of *Anzualdo Castro* deems that the disappeared individual is placed outside the legal framework, given this situation. He is in a kind of legal uncertainty, a limbo, a vacuum, outside the protection of the law. He is deprived of having access to justice, of the recourses that justice provides to him, as well as the protection (which is true, as we have seen, and it is established in international treaties)”.<sup>45</sup> Accordingly, whether an enforced disappearance entails a violation of the right to recognition as a person before the law does not in any way depend on the duration of the deprivation of liberty of the victim. The finding of such a breach is rather based on the actual placement outside the protection of the law of the victim, no matter how long does such placement last; and on the fact the victim is *de facto* placed in the impossibility to exercise any of his or her rights. Again, no matter how long such impossibility may last.

Since the *Anzualdo-Castro* case, the Inter-American Court of Human Rights always found a violation of Article 3 of the Inter-American Convention in its judgments on enforced disappearances, without ever mentioning any requirement of a significant temporal element of the duration of the detention of the victim to find such breach.<sup>46</sup>

In 2011 the WGEID issued a general comment precisely on the right to recognition as a person before the law in the context of enforced disappearances, whereby it highlights that since its first annual report it has considered that enforced disappearances infringe the right to be recognized as a person before the law.<sup>47</sup> The WGEID incisively affirmed that “enforced disappearance represents a paradigmatic violation of the right to

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<sup>44</sup> *Ibid.*, para. 25.

<sup>45</sup> *Ibid.*, paras. 28 and 29.

<sup>46</sup> See, among others, Inter-American Court of Human Rights, Case *García y familiares v. Guatemala*, Ser. C No. 258, judgment of 29 November 2012, paras. 108-110.

<sup>47</sup> WGEID, *General Comment on the right to recognition as a person before the law in the context of enforced disappearances*, *supra* note 22, preamble. For the first annual report of the WGEID, see doc. E/CN.4/1435 of 26 January 1981, para. 184, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G81/151/33/PDF/G8115133.pdf?OpenElement>.

be recognized as a person before the law. [...]”<sup>48</sup> This is related to the placement of the person outside the protection of the law, in light of which “[...] not only the detention is denied, and/or the fate or the whereabouts of the person are concealed, but that while deprived of his/her liberty, this person is denied any right under the law, and is placed in a legal limbo, in a situation of total defencelessness”.<sup>49</sup> Accordingly, the WGEID does not attach any importance to the duration of the deprivation of liberty of the victim to determine whether a violation of the right to recognition as a person before the law exists or not in cases of enforced disappearance. The only “temporal” consideration that the WGEID formulated in its general comment relates to the on-going nature of the violation of the right to recognition as a person before the law. Namely, “even if the right to recognition as a person before the law is extinguished on the death of the disappeared person, its effects may last beyond his/her death [...]. The violation of the right to recognition as a person before the law therefore lasts until the disappearance ends, that is to say when the fate or the whereabouts of the person have been determined”.<sup>50</sup>

### V. - The Temporal Element in the Case *Aboufaied v. Libya*

Despite all the mentioned precedents, the existence of a violation of the right to recognition as a person before the law in enforced disappearance cases and its dependence on an alleged “temporal element” have recently been called into question in a case dealt with by the Human Rights Committee.

On 21 March 2012 the Human Rights Committee adopted its views on the case *Aboufaied v. Libya*,<sup>51</sup> submitted by Mr. Tahar Mohamed Aboufaied on his own behalf and on behalf of his two brothers, Mr. Idriss Aboufaied and Mr. Juma Aboufaied. The author of the communication was represented by the NGOs Al-Karama for Human Rights and TRIAL (*Track Impunity Always*).

In September 2006, Mr. Idriss Aboufaied, a well-known political opponent of Colonel Khaddafi, returned to Libya from his exile in Switzerland after having received assurances that he would have been allowed to express himself freely. Upon his arrival in Tripoli, he was met by members of various Libyan security agencies, subjected to interrogation and his passport was confiscated without explanation. Mr. Aboufaied could leave the airport and reach his hometown, where a few days later agents of the Internal Security Agency (ISA) entered his house ordering him to report to the ISA headquarters. On 5 November 2006 Mr. Aboufaied, while reporting to the ISA Office in Tripoli, was arrested. His family could not obtain information on his fate and whereabouts until 29 December 2006 (i.e. 54 days later), when he was released,

<sup>48</sup> WGEID, *General Comment on the right to recognition as a person before the law in the context of enforced disappearances*, loc. cit., para. 1.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*, para. 4.

<sup>51</sup> HRC, Case *Aboufaied v. Libya* (Communication No. 1782/2008), views of 21 March 2012.

in poor health conditions, without having ever been brought before a judge, nor having been informed about the reasons for his arrest.

Mr. Idriss Aboufaied tried to have his passport returned to travel back to Switzerland and, since Libyan authorities rejected such request, he announced his intention to organize a peaceful public protest in Tripoli on 17 February 2007. The day before the planned protest, Mr. Aboufaied was arrested by a group of armed men, after they violently broke into his house. He was first kept *incommunicado* in a detention center in Tripoli for two months and then transferred to the Ain-Zara prison, where he was kept in the basement and subjected to torture for over five months. In the meantime, his family could not obtain information about his fate and whereabouts until 20 April 2007, when he was brought before a special tribunal in the District of Tajoura. On 10 June 2008 Mr. Idriss Aboufaied was convicted to 25 years' imprisonment. In the night of 8-9 October 2008 he was released from the Sabrata hospital, where he was being held due to his seriously deteriorated health conditions.

Immediately after Mr. Idriss Aboufaied's second arrest (i.e. 16 February 2007), his brother Juma was also arrested at his home by State agents. Mr. Juma Aboufaied was last seen two days later when he was brought back to the family home to collect his mobile phone and computer which were confiscated since then. The family did not know about his fate and whereabouts until 27 May 2008, when Mr. Juma Aboufaied was eventually released.

When submitting the communication to the Human Rights Committee the author claimed that both his brothers were victims of enforced disappearance during different periods (Mr. Idriss Aboufaied for 54 days in 2006 and for over two months in 2007; and Mr. Juma Aboufaied for almost one year and a half between 2007 and 2008). Accordingly, he requested the Human Rights Committee to find violations in respect of Mr. Idriss Aboufaied of Articles 2, para. 3 (right to an effective remedy); 6, para. 1 (right to life); 7 (prohibition of torture); 9, paras. 1 to 4 (right to personal liberty); 10, para. 1 (right to humane treatment of persons deprived of their liberty); 12, para. 2 (right to liberty of movement); 14, paras. 1 and 3.a) and d) (right to fair trial); 16 (right to recognition as a person before the law); 19 (right to freedom of opinion); and 21 (right to peaceful assembly) of the Covenant. In respect of Mr. Juma Aboufaied, the author further alleged violations of Articles 2, para. 3; 6, para. 1; 7; 9, paras. 1 to 4; 10, para. 1; and 6 of the Covenant. Finally, the author claimed to be himself the victim of a violation of Articles 2, para. 3; and 7 of the Covenant.

Libya did never respond to the repeated requests from the Human Rights Committee to submit information concerning the admissibility and merits of the communication. The Committee reiterated that "in the absence of a reply from the State party, due weight must be given to those of the author's allegations that have been



properly substantiated”.<sup>52</sup> The Committee also reaffirmed that “[...] the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author’s allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanation from the State party in this respect, due weight must be given to the author’s allegations”.<sup>53</sup>

Accordingly, the Human Rights Committee found violations of Articles 7 (prohibition of torture); 9 (right to liberty and security of person); 10, para. 1 (right to humane treatment of persons deprived of their liberty); and 16 (right to recognition as a person before the law) of the Covenant with regard to Mr. Idriss and Mr. Juma Aboufaied. Moreover, it declared that there was a violation of Articles 12, para. 2 (freedom to leave one’s country), and 14, paras. 1, 3.a and d (right to fair trial) vis-à-vis Mr. Idriss Aboufaied. The Committee further found that Libya acted in violation of Article 2, para. 3 (right to an effective remedy) read in conjunction with Articles 6, para. 1 (right to life); 7; 9; 10, para. 1; and 16 in respect to Mr. Idriss and Mr. Juma Aboufaied, and read in conjunction with Article 12, para. 2 vis-à-vis Mr. Idriss Aboufaied. Lastly, the Committee declared a violation of Article 7 read alone and in conjunction with Article 2, para. 3, of the Covenant with regard to the author of the communication.

The Committee found that Libya was “under an obligation to provide the author and his brothers with an effective remedy, including (i) a thorough and effective investigation into the disappearance of Idriss and Juma Aboufaied and any ill-treatment that they suffered in detention; (ii) providing the author and his brothers with detailed information on the results of its investigations; (iii) prosecuting, trying and punishing those responsible for the disappearance or other ill-treatment; and (iv) appropriate compensation to the author and his brothers for the violations suffered. The State party is also under an obligation to take measures to prevent similar violations in the future”.<sup>54</sup>

The Human Rights Committee thus qualified the treatment to which both brothers were subjected as enforced disappearance, on the basis of the criteria characterizing its case law on this heinous phenomenon. Nevertheless, this qualification was contended by some of the experts of the Human Rights Committee. They

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<sup>52</sup> *Ibid.*, para. 4.

<sup>53</sup> *Ibid.*, para. 7.4.

<sup>54</sup> *Ibid.*, para. 9.

required the existence of a “temporal element” to qualify an enforced disappearance and, subsequently, to find a violation of Article 16 of the Covenant.

In its concurring individual opinion, Sir Nigel Rodley affirmed that “while concurring with some hesitation in the substantive findings of the Committee, I have misgivings *about the Committee’s unexplained treatment of these cases or at least the case of Idriss Aboufaied explicitly as ‘enforced disappearance’*”.<sup>55</sup> Sir Nigel Rodley claims that “those who are experienced in working with the grotesque and unconscionable practice of enforced disappearance are familiar with the need to distinguish an unacknowledged detention perhaps that exceeds national or international time limits and thus *constitutes at least arbitrary detention, from the horrible reality of enforced disappearance. This distinction would appear to imply a temporal element in the notion of enforced disappearance. Indeed, there is a risk of trivializing the notion, if it is held to cover any secret detention (by which I understand neither the detention to be acknowledged nor the whereabouts disclosed) for however short period*”.<sup>56</sup> However, Sir Nigel Rodley recognizes that “*only one of the international definitions of enforced disappearance, notably that in article 7 (2) (i) of the Rome Statute of the International Criminal Court addresses this temporal dimension. It requires that there be an intent to deprive the person of the protection of the law ‘for a prolonged period of time’*. Effectively, the implication may be that the temporal element is evidence of the placing of the person outside the protection of the law”.<sup>57</sup> It is also noted that “the Committee’s standard language in paragraph 7.10 on Article 16 specifically refers to a ‘prolonged period of time’”.<sup>58</sup>

Sir Nigel Rodley further specifies that, normally, he considers that the Committee “should require *more than the mere assertion albeit, as in this case, uncontested by the State party – that a person falls into the category without a significant temporal element. Not every secret detention, even for as much as two months, as was inflicted on Idriss Aboufaied, would necessarily fall to be treated as an enforced disappearance, as there would not on that basis alone be sufficient evidence of deprivation of protection of the law*”.<sup>59</sup>

In fact, while Sir Nigel Rodley seems to suggest that two months do not amount to a “significant temporal element” under which a secret detention could be defined as an enforced disappearance, he fails to better specify what precisely he means by “significant”, and where would he place the threshold between a significant and a non-significant duration. In his concurring opinion he alleges that “there is less doubt

<sup>55</sup> HRC, Case *Aboufaied v. Libya* (Communication No. 1782/2008), views of 21 March 2012, concurring opinion of Sir Nigel Rodley (emphasis is added).

<sup>56</sup> *Ibid.* (emphasis is added).

<sup>57</sup> *Ibid.* (emphasis is added).

<sup>58</sup> *Ibid.* (emphasis is added).

<sup>59</sup> *Ibid.* (emphasis is added).

regarding the treatment of Juma Aboufaied who was secretly detained for 15 months”.<sup>60</sup> This would hint that, while 15 months are more convincing than two, Sir Nigel Rodley is still somehow doubtful to qualify the violations inflicted on Mr. Juma Aboufaied as an “enforced disappearance”. Yet, it is not clear if they would be “significant enough” and, if not, what would be enough to be considered a significant (or prolonged) temporal element.

The concurring opinion continues by explaining that in the specific case, the fact that Mr. Idriss Aboufaied was twice subjected to two months secret detention is inseparable on facts from the 15 months of “secret detention” of Mr. Juma Aboufaied. Moreover, for both cases, the fact that “the practice of enforced disappearance in Libya is already familiar to the Committee”<sup>61</sup> brings Sir Nigel Rodley to assume that “it is *probable* that both brothers were indeed denied protection of the law, thus rendering permissible their categorization as enforced disappearances and the finding of a violation of article 16”.<sup>62</sup> Sir Nigel Rodley then concludes noting that “[...] most enforced disappearances are really camouflages for clandestine murder. Very occasionally the victims reappear. We should be cautious about relatively brief secret detention, arbitrary and torturous though they be, being treated as *authentic* enforced disappearances”.<sup>63</sup>

The view expressed by Sir Nigel Rodley is further developed in the dissenting opinion attached by Mr. Walter Kälin, who affirms that “both brothers were victims of secret detention, and thus of violations of Article 9 of the Covenant, but it is *more than doubtful that, as the majority seems to suggest, secret detention always and regardless of its duration amounts to a violation of the right to recognition as a person before the law*”.<sup>64</sup>

According to Mr. Kälin, “not every case of a denial of justice or access to a remedy in case of a violation of a right violates Article 16. Rather, as the Committee since 2007 has consistently recognized, this non-derogable guarantee is violated where victims are *systematically* and *for a prolonged* period of time deprived of any possibility to exercise their rights and denied access to a remedy against such violations. Only under such circumstances a *de facto* denial of the right to be treated as a bearer of rights is taking place. [...]”.<sup>65</sup> Mr. Kälin concludes maintaining that “[...] the role of the Committee is to apply Article 16 rather than interpret a notion that is not enshrined in the Covenant. In this regard, I fear that by giving up the *elements of*

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* (emphasis is added).

<sup>63</sup> *Ibid.* (emphasis is added).

<sup>64</sup> HRC, Case *Aboufaied v. Libya* (Communication No. 1782/2008), views of 21 March 2012, concurring opinion of Mr. Walter Kälin.

<sup>65</sup> *Ibid.*

*duration and systematic character of the deprivation of a person of the protection of the law when examining cases under Article 16, the majority risks to trivialize this fundamental human rights guarantee”.*<sup>66</sup>

Neither of the mentioned separate opinions seems persuasive. Indeed, some of the arguments contained in the said opinions could be even detrimental to the protection of human rights. As well summarized by Mr. Fabián Omar Salvioli in his partly dissenting opinion, there would in fact be a “risk of weakening the concept of enforced disappearance by introducing a time dimension as an additional element”.<sup>67</sup>

While it is true that the Human Rights Committee referred to the definition of enforced disappearance as included in the 1998 Rome Statute in a number of cases,<sup>68</sup> in 2010 the Committee started instead quoting the definition of enforced disappearance as set forth by Article 2 of the 2007 Convention and leaving the reference to the 1998 Rome Statute in a footnote.<sup>69</sup> In the views adopted on 19 July 2012 on the case *Dev Bahadur Maharajan v. Nepal*, issued after those concerning the *Aboufaied* case, only Article 2 of the 2007 Convention is referred to.<sup>70</sup>

More generally, the reference to the definition of enforced disappearance as set forth in the 1998 Rome Statute instead of that contained in the 1992 Declaration or the 2007 Convention, is disputable. Why would the Human Rights Committee, a body in charge of monitoring the implementation of the International Covenant on Civil and Political Rights and, by its very nature, a mechanism related to international human rights law, have to refer to a treaty of international criminal law? As analysed above, the 1998 Rome Statute is the only treaty dealing with enforced disappearance that includes the phrase “for a pronged period of time” in its definition as a crime against humanity, linking it to the intention of the perpetrator to place the victim outside the protection of the law.

It is not clear why, following Sir Nigel Rodley or Mr. Kälin, the Human Rights Committee should take a step backwards, depart from its nature of monitoring body of international human rights law, and disregard all the other existing definitions of enforced disappearance (indeed contained in international human rights legal instruments) in favour of the one proposed by an instrument of international criminal law. In particular, it is not clear from the views expressed by the two experts what the benefit to refer to such provision instead of the others would be. Human rights monitoring bodies shall be inspired, among others, by the *pro homine*

<sup>66</sup> *Ibid.* (emphasis is added).

<sup>67</sup> HRC, Case *Aboufaied v. Libya* (Communication No. 1782/2008), views of 21 March 2012, partly dissenting opinion of Mr. Fabián Omar Salvioli, para. 6.

<sup>68</sup> See, among others, HRC, Case *Kimouche v. Algeriai* (Communication No. 1328/2004), views of 10 July 2007, para. 7.2; and Case *Grioua v. Algeria* (Communication No. 1327/2004), views of 10 July 2007, para. 7.2.

<sup>69</sup> HRC, Case *Benaziza v. Algeria* (Communication No. 1588/2007), views of 26 July 2010, para. 9.3 See also HRC, Case *Wanis El Abani v. Libyan Arab Jamahiriya* (Communication No. 1640/2007), views of 26 July 2010, para. 7.3.

<sup>70</sup> HRC, Case *Dev Bahadur Maharajan v. Nepal* (Communication No. 1863/2009), views of 19 July 2012, para. 3.1 and footnote 10.

principle (also called *pro persona*), in order to interpret treaties in the way which is most protective of human rights. Pursuant to Article 31 para. 1 of the Vienna Convention on the Law of the Treaties, a treaty must be interpreted in the light of its object and purpose. Human rights law treaties aim at guaranteeing fundamental rights to individuals and the interpretation that is more conducive to the protection of the individual (be it the direct victim of a violation or his or her relatives) must be preferred.

In his partly dissenting opinion in the *Aboufaied* case Mr. Salvioli pointed out that the two instruments related to enforced disappearance within the United Nations system to be taken into account for interpretive purposes are the 1992 Declaration, whereby “the time factor (requirement of a minimum length of time to determine whether or not an enforced disappearance has been committed) is not even mentioned”,<sup>71</sup> and the 2007 Convention. Mr. Salvioli also referred to the definition of enforced disappearance contained in the 1994 Inter-American Convention. Furthermore, he persuasively argued that “the Rome Statute (which is not a human rights treaty but an international criminal law treaty) has been heavily criticized for not following the definitions laid down in the international human rights instruments for various types of crimes. In the case of enforced disappearance, it incorporates the time dimension as an element of intent on the part of the perpetrator (the perpetrator must have intended to remove a person from the protection of the law for a prolonged period of time). *However, it should be noted that there is no reference to the duration of detention: it merely has to be proved that the perpetrator intended to remove the person from the protection of the law for a certain period of time. [...]*”.<sup>72</sup>

Thus Mr. Salvioli concluded that “[...] as regards the parameters to apply in dealing with acts of enforced disappearance, the Human Rights Committee would be ill-advised to use the Rome Statute as a reference, instead of continuing to be guided by its own rich jurisprudence (which has never referred to a period of time) or by the clear provisions of the United Nations Convention on the subject”.<sup>73</sup>

It is also somehow arguable that the Committee’s standard language on an alleged violation of Article 16 of the Covenant on cases of enforced disappearance specifically requires that the victim is placed outside the protection of the law for a prolonged period of time and that this must happen systematically, as suggested by Mr. Kälin.

Indeed, it would seem that the standard language of the Human Rights Committee on Article 16 in cases of enforced disappearances has been referred to only in a fragmented way by the two experts. As recalled above,<sup>74</sup> since 2007 the Human Rights Committee deemed it necessary to determine “[...] whether and in

<sup>71</sup> HRC, Case *Aboufaied v. Libya* (Communication No. 1782/2008), views of 21 March 2012, partly dissenting opinion of Mr. Fabián Omar Salvioli, para. 8.

<sup>72</sup> *Ibid.*, para. 12 (emphasis is in the original).

<sup>73</sup> *Ibid.*, para. 14.

<sup>74</sup> *Supra* para. IV.

what circumstances an enforced disappearance may constitute a refusal to recognize the victim as a person before the law”.<sup>75</sup> On this occasion, the Committee articulated its reasoning on the existence of a violation of Article 16 in cases of enforced disappearance in two paragraphs, pointing out that “[...] intentionally removing a person from the protection of the law *for a prolonged period of time* may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, *if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, Article 2, para. 3), have been systematically impeded*. In such situations, disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law. [...]”.<sup>76</sup>

The wording adopted by the Human Rights Committee indeed mentions the intentional removal of the person from the protection of the law for a prolonged period of time. Nevertheless, it would seem that to find a violation of Article 16 in cases of enforced disappearance, the Human Rights Committee eventually considers that “[...] *if a person is arrested by the authorities and there is subsequently no news of that person’s fate, the failure by the authorities to conduct an investigation effectively places the disappeared person outside the protection of the law*”.<sup>77</sup> By this reasoning, the Human Rights Committee ties the placement of the victim outside the protection of the law to the lack of investigation by authorities instead of any temporal element.

Further, the adverb “systematically”, is referred by the Human Rights Committee to the fact that efforts of relatives of the disappeared person to obtain access to potentially effective remedies have been impeded. This seems to substantively differ from the alleged requirement put forward by Mr. Kälin that “the deprivation of a person of the protection of the law has a systematic character” to declare a violation of Article 16 of the Covenant.

The Human Rights Committee reproduced the above-mentioned wording in a number of views.<sup>78</sup> Subsequently, it merged the phrasing previously used in the consideration of a potential violation of Article 16 of the Covenant and referred to it in a single paragraph, affirming that “[...] the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen

<sup>75</sup> HRC, Case *Kimouche v. Algeriai* (Communication No. 1328/2004), views of 10 July 2007, para. 7.8.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, para. 7.9 (emphasis is added).

<sup>78</sup> See also HRC, Case *Grioua v. Algeria* (Communication No. 1327/2004), views of 10 July 2007; and Case *Madoui v. Algeria* (Communication No. 1495/2006), views of 28 October 2008, paras. 7.7 and 7.8.

and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, Article 2, para. 3) have been systematically impeded. [...] It considers that when a person is arrested by the authorities, if there is subsequently no news on their fate and no investigation is carried out, this omission on the part of the authorities amounts to removing the disappeared person from the protection of the law”.<sup>79</sup>

Lately, including in the views delivered on the *Aboufaied* case, the Human Rights Committee limited itself to reproduce only the first half of the phrase, where in fact reference to the prolonged period of time of the removal from the protection of the law is made,<sup>80</sup> while “systematically” continues to concern the impediment of access to effective remedies for the relatives of the disappeared person.

The views expressed by Sir Nigel Rodley, namely that an “authentic enforced disappearance” occurs only when a “significant temporal element” is demonstrated are in conflict with the position taken by the WGEID, that has expressed concern also for the practice of “short-term enforced disappearance”.

In its annual report for 2011 it indicates with concern that “[...] the Working Group has also witnessed the use of ‘short term disappearances’, where victims are placed in secret detention or unknown locations, *outside the protection of the law, before being released weeks or months later*, sometimes after having been tortured and without having been brought in front of a judge or other civil authority. This very worrisome practice, whether it is used to counter terrorism, to fight organized crime or suppress legitimate civil strife demanding democracy, freedom of expression or religion, *should be considered as an enforced disappearance and as such adequately investigated, prosecuted and punished*”.<sup>81</sup>

Further, in its general comment on the definition of enforced disappearance, the WGEID declared that cases where the victim has already been found dead could fall within the definition of the crime provided by the 1992 Declaration: “[...] Indeed, under the Methods of Work, clarification occurs when the whereabouts of the disappeared persons are clearly established irrespective of whether the person is alive or dead. However, this does not mean that such cases would not fall within the definition of enforced disappearance included in

<sup>79</sup> HRC, Case *Benaziza v. Algeria* (Communication No. 1588/2007), views of 26 July 2010, para. 9.8.

<sup>80</sup> HRC, Case *Wanis El Abani v. Libyan Arab Jamahiriya* (Communication No. 1640/2007), views of 26 July 2010, para. 7.9; Case *Adam Hassan Aboussedra v. Libyan Arab Jamahiriya* (Communication No. 1751/2008), views 25 October 2010, para. 7.9; Case *Brahim Aouabdia and al. v. Algeria* (Communication No. 1780/2008), views of 22 March 2011, para. 7.9; Case *Fatma Zohra Berzig and Kamel Djebrouni v. Algeria* (Communication No. 1781/2008), views of 31 October 2011, para. 8.9; Case *Khirani v. Algeria* (Communication No. 1905/2009), views of 26 March 2012, para. 7.9; and Case *Guezout and Rakik v. Algeria* (Communication No. 1753/2008), views of 19 July 2012, para. 8.9. Notably, in the Case *Aboussedra*, the HRC declared a violation of Article 16 of the Covenant even if authorities actually acknowledged the detention of the victim and authorized his family to visit him once, because of the subsequent failure to provide any further information about the victim.

<sup>81</sup> WGEID, *Annual Report for 2011*, doc. A/HRC/19/58/Rev.1 of 2 March 2012, *loc. cit.*, para. 50 (emphasis is added). At para. 117 of the report it is further reiterated “[...] that enforced disappearance is a crime under international law and that even short-term secret detentions can qualify as enforced disappearances. [...]”.

the Declaration if (i) the deprivation of liberty took place against the will of the person concerned, (ii) with involvement of government officials, at least indirectly by acquiescence, and (iii) state officials thereafter refused to acknowledge the act or to disclose the fate or whereabouts of the person concerned. [...]”.<sup>82</sup> The WGEID clearly indicated that “[...] *a detention, followed by an extrajudicial execution, [...], is an enforced disappearance proper*, as long as such detention or deprivation of liberty was carried out by governmental agents of whatever branch or level, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government, and, subsequent to the detention, or even after the execution was carried out, state officials refuse to disclose the fate or whereabouts of the persons concerned or refuse to acknowledge the act having been perpetrated at all”.<sup>83</sup> No temporal requirement whatsoever is attached to the detention of the victim and yet the enforced disappearance, unfortunately, is an authentic one.

Along the same line, Mr. Salvioli in his partly dissenting opinion attached to the views on the *Aboufaied* case noted that “[...] Thus, for example, if a person is detained or abducted by or with the acquiescence of agents of the State, no information is provided on the place of detention and a few days later the person concerned is found dead, or even if he succeeds in escaping from captivity and is reunited with his family, it is difficult to maintain that he was not the victim of enforced disappearance, as has happened in numerous cases in many countries of the world, particularly in South America during the military dictatorships”.<sup>84</sup> Accordingly, he affirmed that “the time dimension in the sense of requiring a minimum duration of detention has no place in the categorization of enforced disappearance”.<sup>85</sup>

The fact that the approach proposed by Sir Nigel Rodley and Mr. Kälin is rather isolated is confirmed also by the recent judgment rendered on 13 December 2012 by the Grand Chamber of the European Court of Human Rights on the case *El-Masri v. The Former Yugoslav Republic of Macedonia*.<sup>86</sup> On 31 December 2003 Mr. Khaled El-Masri, a German national of Lebanese origin, was arrested at the border crossing by the Macedonian police and taken to a hotel in Skopje, where he was kept locked in a room for 23 days without allowing him any contact with the outside world. Mr. El-Masri was subsequently taken to Skopje Airport, handcuffed and blindfolded. There he was severely beaten, tortured and abused by disguised men, before being transferred to Afghanistan, where he was kept for over four months in a small, dirty, dark concrete cell in a brick factory near Kabul, subjected to repeated interrogation, beatings, and threats. All his attempts to make contact with the outside world were turned down. Eventually, Mr. El-Masri was taken, blindfolded and

<sup>82</sup> WGEID, *General Comment on the Definition of Enforced Disappearance*, loc. cit., para. 10.

<sup>83</sup> *Ibid.*, para. 10 (emphasis is added).

<sup>84</sup> HRC, Case *Aboufaied v. Libya* (Communication No. 1782/2008), views of 21 March 2012, partly dissenting opinion of Mr. Fabián Omar Salvioli, para. 12.

<sup>85</sup> *Ibid.*, para. 14.

<sup>86</sup> European Court of Human Rights, Case *El-Masri v. The Former Yugoslav Republic of Macedonia*, judgment of 13 December 2012.



handcuffed, by plane to Albania and subsequently to Germany. Immediately after his return to Germany, he contacted a lawyer and brought several legal actions since, including the submission of a complaint to the European Court of Human Rights.

Applying, *mutatis mutandis*, the reasoning of Sir Nigel Rodley and Mr. Walter Kälin to the *El-Masri* case, the described situation could arguably not fall within the category of enforced disappearance, at least as regards the deprivation of liberty suffered by the victim in Macedonia. However, the European Court of Human Rights, rather following the approach undertaken by the majority of the members of the Human Rights Committee in the *Aboufaied* case and summarized in Mr. Salvioli's separate opinion, disregarded any temporal element requirement and held that "[...] the Court considers that the applicant's abduction and detention amounted to 'enforced disappearance' as defined in international law. The applicant's 'enforced disappearance', *although temporary*, was characterized by an on-going situation of uncertainty and unaccountability, which extended through the entire period of his captivity. In this connection the Court would point out that in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned".<sup>87</sup>

Most notably, when spelling out the relevant international law and public material on enforced disappearance to take into consideration to pronounce itself on the case, the European Court of Human Rights referred to Articles 1, 2, 3 and 4 of the 2007 Convention and did not even mention the 1998 Rome Statute.

The European Court of Human Rights found violations of Articles 3 (prohibition of torture) both in its procedural and substantive aspects; 5 (right to liberty and security); 8 (right to respect for private and family life); and 13 (right to an effective remedy) in conjunction with Articles 3, 5 and 8 of the European Convention on Human Rights.

Had any significant temporal element been requested by the judges of the European Court of Human Rights to qualify the treatment suffered by Mr. El-Masri as an enforced disappearance, the judgment would have lost a significant part of its rigour and the applicant would have been subjected to a further injustice.

Finally, both Sir Nigel Rodley and Mr. Kälin insist that there would be a distinction between secret detention and enforced disappearance. This contradicts the findings contained in the above mentioned joint study on

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<sup>87</sup> *Ibid.*, para. 240 (emphasis is added).

global practices in relation to secret detention in the context of countering terrorism, whereby it is clearly affirmed that “*every instance of secret detention also amounts to a case of enforced disappearance*”.<sup>88</sup>

There is no merit in creating a distinction between secret or unacknowledged detention and enforced disappearance, depending on an unspecified period of time. A secret or unacknowledged detention, provided that it exceeds the critical moment as determined under international law,<sup>89</sup> is by definition an enforced disappearance. In fact, a definition of the human rights violation of secret or unacknowledged detention does not exist in present international law, as its proper name is enforced disappearance. If some States, for whatever reason, decide to extend in their domestic legislation or practice the duration of secret or unacknowledged detentions, they can only be held responsible for a violation of the international obligation not to subject individuals to enforced disappearance. The risk is not that of trivializing enforced disappearance by giving this name to instances where the concealment of the fate and whereabouts of the victim has lasted for a short time. The real risk is to disguise the heinous nature of enforced disappearance by creating an unwarranted confusion, unduly overlapping the notions of arbitrary, secret and unacknowledged detentions, on the one side, and enforced disappearance, on the other.<sup>90</sup> Under international human rights law, especially as it results after the adoption of the 2007 Convention,<sup>91</sup> those arbitrary detentions that are qualified by their secret or unacknowledged character are to be considered as enforced disappearance.<sup>92</sup> Maintaining that all enforced disappearances remain enforced disappearances, and that every secret detention is an enforced disappearance, is needed to avoid the creeping diffusion of the practice of “short-term enforced disappearances” and constitutes an indispensable tool for the eradication of this plague. In fact, as pointed out by Mr. Salvioli in a concurring opinion attached to the views recently issued by the Human Rights Committee on a new case of enforced disappearance, “secret detention is a euphemism that covers actual enforced disappearances of person”.<sup>93</sup>

<sup>88</sup> Doc. A/HRC/13/42, *loc. cit.*, para. 28.

<sup>89</sup> See *supra*, para. II.

<sup>90</sup> While, as pointed out above, International law does not provide a definition of secret and unacknowledged detention, arbitrary detention has been defined, among others, by the Working Group on Arbitrary Detentions. According to the methods of work of the latter, deprivation of liberty is arbitrary if a case falls into one of the following three categories: a) when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him); b) when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights; and c) when the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.

<sup>91</sup> See in particular Article 17, para. 1, which reiterates that “no one shall be held in secret detention”.

<sup>92</sup> As confirmed by the definition of arbitrary detention given by the Working Group on Arbitrary Detention, *loc. cit.*, it is evident that many instances of arbitrary detention do not involve any secret or unacknowledged character. But if a person is deprived of liberty in a secret or unacknowledged manner, his or her detention changes in substance and name.

<sup>93</sup> HRC, Case *Il Khwildy v. Libya* (Communication 1804/2008), views of 1 November 2012, concurring opinion by Mr. Salvioli, para. 3.

## VI. – Conclusion

*Time is precious, but truth is more precious than time.*

B. Disraeli, Speech at Aylesbury Royal and Central Bucks Agricultural Association (21 September 1865)<sup>94</sup>

The imperative not to trivialize the notion of enforced disappearance and the related fundamental human rights guarantees has been expressed by scholars, experts and judges and is certainly to be shared.

Arguably, the risk of trivialization of enforced disappearance could be more related to the interpretation given to its definition as contained in different international legal instruments. As pointed out, while some elements are common to all the international instruments concerning this practice, others may be disputable and generate some doubts. Doubting is natural and, often, brings to significant jurisprudential developments. As pointed out by Judge García Ramírez “[...] the doubt is usually resolved with a reference that tips the scale: *pro persona*, in the double sense of the benefit of a victim of a specific violation and the development of the general protection of human beings. *Pro persona*, of course, with a reasonable basis. Otherwise, there would be mere impulse, subjectivity, and perhaps arbitrariness”.<sup>95</sup>

Along the same line, in its general comment on the definition of enforced disappearance, the WGEID highlighted the need to construe the definition of enforced disappearance “in a way that is most conducive to the protection of all persons from enforced disappearance”.<sup>96</sup>

The analysis of some judgments and views delivered in the past by international human rights mechanisms shows that, whenever attempts have been made to affirm the existence of a temporal element in enforced disappearance – either to declare a violation of the right to life or to qualify a crime as “authentic enforced disappearance” and find a violation of the victim’s right to recognition as a person before the law – this created confusion and contradiction, and eventually was certainly not conducive to the best protection of persons from enforced disappearance.

It is the on-going situation of uncertainty and unaccountability to which the victim of enforced disappearance is subjected, notwithstanding how long it may last, that puts the person outside the protection of the law and triggers a violation of his or her right to be recognized as a person before the law, together with other fundamental human rights. As long as the essential cumulative elements of the crime (that is deprivation of liberty against the will of the victim; involvement of State officials; and denial that the deprivation of liberty

<sup>94</sup> In DISRAELI (B.), *Wit and Wisdom of Benjamin Disraeli, Earl of Beaconsfield, Collected from his Writings and Speeches*, London, 1881, p. 356.

<sup>95</sup> Inter-American Court of Human Rights, Case *Anzualdo-Castro*, *supra* note 37, concurring opinion of Judge Sergio García Ramírez, para. 10.

<sup>96</sup> WGEID, *General Comment on the Definition of Enforced Disappearance*, *loc. cit.*, preamble.

actually took place and concealment of the fate or whereabouts of the victim) are present, no matter for how long this may last, we are dealing with an enforced disappearance and the plethora of human rights violations that characterizes such heinous practice.

In fact, existing legal instruments of international human rights law do not include any temporal element in the definition of enforced disappearance, and rightly so. As observed by Mr. Salvioli in his partly dissenting opinion in the *Aboufaied* case: “incorporating the time dimension into the topic under discussion could have still more serious consequences: how much time should be allowed before implementing the urgent action mechanisms provided for by the conventions protecting persons against enforced disappearance, or United Nations non-treaty mechanisms? International human rights law was very wise never to have introduced a minimum duration of detention to establish an artificial and fragmented standard for the crime of enforced disappearance”.<sup>97</sup>

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<sup>97</sup> HRC, Case *Aboufaied v. Libya* (Communication No. 1782/2008), views of 21 March 2012, partly dissenting opinion of Mr. Fabián Omar Salvioli, para. 13.