

The International Convention for the Protection of All Persons from Enforced Disappearance: A Milestone in International Human Rights Law

By Gabriella Citroni*

“[...] Je vous demande de faire de ce grand espoir d’hier, une réalité pour demain”.

Bernard Kessedjian, speech of presentation of the Convention to the Human Rights Council, Geneva, 27 June 2006

This article is dedicated to the memory of Amb. Kessedjian for his outstanding contribution to the struggle against enforced disappearance

The first effort to promote the adoption of an international treaty against enforced disappearance was undertaken in 1981 by the Human Rights Institute of the *Ordre des Avocats de Paris* which convened a colloquium on the issue. Afterwards, similar initiatives were promoted by associations of relatives of disappeared people worldwide. The answer to such claims has been relatively slow: in 1992 the UN General Assembly adopted the Declaration for the Protection of All Persons from Enforced Disappearance (fundamental although not legally binding); in 1994 the Inter-American Convention against Forced Disappearance was opened for signature (entered into force in 1996 and so far ratified by 13 Latin American States); and in 1998 the widespread and systematic practice of enforced disappearance was included in the list of crimes against humanity under the Rome Statute of the International Criminal Court. Nevertheless, a number of gaps and ambiguities existed in the legal framework and a universally binding instrument against enforced disappearance was lacking while the phenomenon was (and remains) on the increase worldwide. In 2008 the UN Working Group on Enforced or Involuntary Disappearance received 1,203 new reported cases from 28 countries (outstanding instances are Nepal, Sri Lanka and Russia). In 29 years of activity, the Group has received about 53,000 cases from 79 countries.

In 2001 a Working Group was mandated within the UN to draft an instrument for the protection of all persons from enforced disappearance (in 1998 a UN Sub-Commission had already made an attempt). The Group, chaired by French Ambassador Kessedjian, first met in Geneva in January 2003 and concluded its works on 23 September 2005 with the adoption of the draft of the International Convention for the Protection of All Persons from Enforced Disappearance (“the Convention”). The negotiations which led to the approval of the Convention were characterized by the active participation of NGOs and representatives of relatives of disappeared people coming from different continents, whose interventions deeply influenced the drafting of the instrument.

In December 2006 the Convention was adopted by the UN General Assembly and on 6 February 2007 it was opened for signature in Paris. It will enter into force on the 30th day after the deposit with the Secretary General of the 20th instrument of ratification or accession. By the beginning of June 2009, the Convention has been signed by 81 States and ratified by 10: *Albania, Argentina, Bolivia, Cuba, France, Honduras, Kazakhstan, Mexico, Senegal and Uruguay* (emphasis is used for States that accepted the competence of the Committee on Enforced Disappearance to receive and consider communications).

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The Convention represents a milestone in international human rights law as it expressly recognizes the non-derogable right of every one not to be subjected to enforced disappearance (Art. 1). The Convention is also the first human rights treaty which recognizes the right to know the truth regarding the circumstances of the disappearance, the progress and results of the investigation and the fate of the disappeared (Art. 24.2). Art. 17 of the Convention establishes that no one shall be held in secret detention.

Enforced disappearance is defined as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law” (Art. 2). Accordingly, the offence has these constitutive elements: the deprivation of liberty, carried out by State agents or by people or groups of people acting with the acquiescence, authorization or support of the State, followed by a refusal to acknowledge the deprivation of liberty or by the concealment of the fate or whereabouts of the disappeared person. The placement of the victim outside the protection of the law is an inherent consequence and not a separate constitutive element of the crime. The Convention avoids referring to the ambiguous element of the “intention of the author to place the disappeared person outside the protection of the law for a prolonged period of time” which had been introduced by the 1998 Rome Statute. The Convention recognizes that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity (Art. 5) and, as such, is imprescriptible. Further, the Convention admits the possibility that acts of the same nature of enforced disappearances may be committed by “non-State actors”. In these cases, States must investigate such acts and bring those responsible to justice (Art. 3).

Several provisions of the Convention refer to the establishment of criminal responsibility over cases of enforced disappearance and set forth an articulated discipline for judgment and sanctioning of those responsible. In particular, the Convention establishes that States must codify enforced disappearance as an autonomous ongoing offence under their criminal law, punishing it by appropriate penalties (Art. 4 and 7), and States which apply a statute of limitations must ensure that it is of long duration and proportionate to the extreme seriousness of the offence and commences from when the fate and whereabouts of the disappeared person have been established with certainty (Art. 8).

The Convention makes it clear that no order or instruction from any public authority may be invoked to justify an enforced disappearance (Art. 6.2, 23.2 and 23.3) and it also provides for criminal responsibility of superiors that exercised effective responsibility for and control over activities concerned with acts of disappearance as well as those who knew and disregarded information that their subordinates were about to commit a disappearance and failed to prevent and repress the commission of the crime (Art. 6.1). The Convention establishes quasi-universal jurisdiction: a State must take all necessary measures to exercise its jurisdiction over an enforced disappearance when the latter is committed in any territory under its jurisdiction; when the alleged offender is one of its nationals, and when the disappeared is one of its nationals and the State considers it appropriate (Art. 9.1). Likewise, a State must take the necessary measures to establish its competence to exercise jurisdiction over an enforced disappearance when the alleged offender

is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State or to an international criminal tribunal whose jurisdiction it has recognized (Art. 9.2 and 11.1).

The Convention recognizes the right of any individual who alleges that a person has been subjected to enforced disappearance to report the fact to the competent authorities, which must examine promptly and impartially the allegation and undertake without delay a thorough and effective investigation. States must also prevent and sanction acts that hinder the conduct of an investigation and ensure that persons suspected of having committed a disappearance are not in a position to influence the progress of an investigation (Art. 12).

In cases of enforced disappearance the struggle against impunity is indeed a crucial factor. However, the complex dimension of the phenomenon requires an approach that goes beyond mere the criminal dimension and that deals also with prevention and adequate protection of the rights of the victims. This is why an international human rights treaty such as the Convention is more appropriate than international criminal law alone.

The Convention adopts a broad definition of the notion of victims of disappearance, including the direct victim and any individual (such as relatives, who are subjected to anguish and suffering amounting to inhumane treatment) who has suffered harm as the direct result of an enforced disappearance (Art. 24.1). The Convention recognizes and guarantees a set of rights to victims: States must take all appropriate measures to search for, locate and release the disappeared and, in the event of death, to locate, respect and return their mortal remains (Art. 24.3). States must ensure that the victims have the right to obtain reparation and prompt, fair and adequate compensation. Reparation shall include measures of restitution, rehabilitation, satisfaction, restoration of dignity and reputation and guarantees of non-repetition (Art. 24.5). States must guarantee the right to form and participate freely in associations struggling against disappearance (Art. 24.7).

The Convention sets forth a comprehensive regulation of the heinous phenomenon of wrongful removal of children (children subjected to enforced disappearance; children whose parents are subjected to enforced disappearance or children born during the captivity of a mother victim of disappearance), which occurred systematically, for instance, in Argentina, El Salvador and Guatemala. Under the Convention, States must adopt all necessary measures to prevent and punish such conducts as well as the falsification, concealment or destruction of documents attesting to the true identity of the children (Art. 25.1). The Convention provides that States which recognize a system of adoption or of placement of children must have legal procedures in place to review and, where appropriate, to annul any adoption or placement that originated in an enforced disappearance (Art. 25.4).

The Convention establishes a Committee on Enforced Disappearances, consisting of 10 independent experts and entrusted with the mandate to monitor the implementation of the treaty (Art. 26 to 36). The Committee will:

- receive and consider reports from the States Parties (Art. 29);
- receive requests that a disappeared person should be sought and found, as a matter of urgency (Art. 30);

- receive and consider individual or inter-State communications concerning violations of the Convention by States that have expressly declared to recognize such competence (Arts. 31 and 32);
- undertake country visits, after consultation with the States concerned (Art. 33);
- urgently bring to the attention of the UN General Assembly, through the Secretary General, the fact that enforced disappearance is being practised on a widespread or systematic basis in the territory of a State Party (Art. 34).

The Convention finally fills a legal gap and represents an effective tool to prevent and suppress the international crime of enforced disappearance as well as a political message that this odious practice and ultimate denial of human beings will no longer be tolerated.