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**Abstract:**

*The entry into force of the Convention for the Protection of all Persons from Enforced Disappearance at the end of 2010 signified the most important step in the struggle against enforced disappearances and marked a development in international human rights law. This article provides a historical overview of the phenomenon and tracks the background of the Convention's adoption. It analyses and evaluates the definition adopted by the Convention. It also probes into practices applied against terrorism and suggests that they should be classified as enforced disappearances under the Convention. Overall, it is argued that the Convention's application can be expected to cement detainees' protection.*

## Article

**THE CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM  
ENFORCED DISAPPEARANCE: MOVING HUMAN RIGHTS  
PROTECTION AHEAD**

Ioanna Pervou\*

## TABLE OF CONTENTS

1. INTRODUCTION .....	121
2. A HISTORICAL OVERVIEW .....	121
3. INTERNATIONAL LEGAL RESPONSES TO ENFORCED DISAPPEARANCES.....	123
4. ENFORCED DISAPPEARANCES: THE QUEST FOR A WIDELY ACCEPTED AND COMPREHENSIVE DEFINITION.....	129
5. ENFORCED DISAPPEARANCES THROUGH THE ANTI-TERRORIST SPECTRUM.....	136
5.1 Incommunicado Detentions .....	136
5.2 Extraordinary Renditions.....	139
5. CONCLUSION.....	141

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## 1. INTRODUCTION

Enforced or involuntary disappearances are a persisting phenomenon globally. The international community has been addressing it for more than forty years, not always successfully. All previous attempts have been stumbling at states' reluctance to share information and admit the exercise of disappearances, as well as to punish themselves (i.e. their organs and agents involved therein). Thereby there was not any international legal framework for years and only fragmented regional efforts had been recorded. Still, disappearances' complexity has turned into a retarding factor for the complete legal response to the phenomenon. Unlike torture and extraordinary executions, disappearances cannot be easily conceptualized and further captured in a definition. As a result, only the systematic study of the phenomenon's historical background can determine its specificity. States, or more precisely governments, have developed a number of practices which varied slightly, yet significantly, to erase the traces of those they considered opponents; opponents being determined mainly by their political beliefs or solely by their race. As a matter of fact, any legal response should cover all forms a disappearance could take and offer the maximum protection to any potential victim. The legal imprint of the phenomenon should correspond to all factual combinations and at the same time avoid a descriptive character. These are the pillars the 2007 United Nations Convention on Enforced Disappearances lies on. The international community has learnt its lesson well and took a holistic approach on the phenomenon of enforced disappearances. The definition provided takes into account the historical aspects of disappearances and aims to comprise all contemporary methods applied by states currently. In this sense, the Convention's definition serves a double goal: first, to demonstrate the distinct character of the phenomenon and protect all persons from the standardized methods reported so far and secondly to prevent the emergence of novel practices of disappearances. Regarding the first goal, there is little doubt for the Convention's success; however as disappearances remain in reality there are still challenges to be resolved. In this respect, the practices states apply to investigate terrorist acts incorporate elements of disappearances and raise the question whether they could fall within the Convention's protective scope and be classified as enforced disappearances. Anti-terrorist methods are a test for the Convention's applicability; uncharted waters which need to be further explored. All told, the Convention's value depends primarily on its applicability to current developments in public international law.

## 2. A HISTORICAL OVERVIEW

The term 'enforced disappearances' (*desaparación forzada*) was introduced by Latin American NGOs<sup>1</sup> to encapsulate a phenomenon that occurred in South America in the second half of the 20<sup>th</sup> century. For some authors this term is 'a euphemism'<sup>2</sup> for describing a series of severe human rights violations. Moreover, enforced

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1 ECOSOC 'Civil and Political Rights, Including Questions of: Disappearances and Summary Executions' UN Doc E/CN.4/2002/71 (8 January 2002) para 8.

2 Jackson Nyamuya Maogoto, 'Now You See, Now You Don't: The State's Duty to Punish Disappearances and Extra-Judicial Executions' (2002) 3 *AustlInt'l LJ* 176, 182.

disappearances are considered a recent addition to the human rights agenda,<sup>3</sup> and it has attracted global concern principally because of the large number of victims.

Enforced disappearances were recorded for the first time during World War II, when thousands were disappeared due to the policy of the 'Night and Fog Decree' (known as the 'Keitel Order').<sup>4</sup> In that case, Adolf Hitler ordered the transfer of people who were deemed dangerous for the security of the Third Reich to the concentration camps in Germany. Vanishing without leaving a trace and providing information was thought to be an appropriate measure for the intimidation of the potential enemies of the Reich.

This Gestapo policy later spiraled in Latin America taking the form of a systematic, governmental practice; this practice aimed at the suppression of political opposition, since it was considered a threat to national security.<sup>5</sup> More specifically, during the 1960s and the 1970s, and especially within the political context of the Cold War, military juntas seized power in most Latin American countries. The majority of those military juntas were serving the establishment and preservation of a capitalist system based upon foreign investments. These dictatorships are usually referred to as 'bureaucratic – authoritarian' regimes. This term emphasizes the fact that the Latin American dictators did not aim to dissolve public institutions, but on the contrary to use them in favour of their regime. Consequently, at some level the term 'enforced disappearances' is also a synonym for the incessant use of military force to obliterate any form of opposition and to ensure public order. In this setting, enforced disappearances proved to be an effective measure for the sustainability of the military juntas.

Overall, the juntas sought to terrorize people in order to establish civil obedience. Therefore, the authorities turned against civilians regardless of their ideology making disappearances a part of everyday life in Latin America. Governments elaborated a very specific and detailed mode of operation. The victims were usually carried off from their homes in the presence of their families. Then they were transferred to secret detention centers where they were tortured to death. Torture was not an interrogation method but rather a means of dehumanizing the detainees, before death. The military applied unlimited torture, although they did not aim to extract information or obtain confessions from the victims. They viewed torture as part of their mission to cleanse society politically; opponents had to be punished before executed. The authorities refused to inform the victims' relatives of their fate and denied their detention. Most of the cases ended in extrajudicial executions and very few victims survived and reappeared.<sup>6</sup> This situation raised the concern of the Inter-American Commission on Human Rights (IACCommHR). After making reference to Argentina's 'disappeared' in 1978 it began to report on disappearances

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3 ECOSOC (n 1), para 7.

4 Christopher K Hall, 'Enforced disappearance of persons' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft 1991)151.

5 L Roniger and M Sznajder, *The Legacy of Human-Rights Violations in the Southern Cone, Argentina, Chile and Uruguay* (OUP 1999) 7-28.

6 National Commission on the Disappearance of Persons (CONADEP), '*Nunca Más* (Never Again) Report', 1984.

in Guatemala and Chile, encountering unsurprisingly the regimes' unwillingness to cooperate.<sup>7</sup>

Nevertheless enforced disappearances soon spread beyond Latin America. By way of example, during the 1970s many individuals' status was also unknown in Cyprus, as a result of the 1974 Turkish military intervention. However, these victims are not referred to as 'disappeared persons' but as 'missing' or 'persons unaccounted for', to demonstrate the difference between the causes of their disappearance.<sup>8</sup> This pattern suggests that enforced disappearances were mainly 'attributable to political reasons'.<sup>9</sup> The Philippines is another example where disappearances served as a tool against political opposition. During the Marcos Dictatorship (1971-1986) the country suffered from innumerable disappearances which were systematically applied from 1976 onwards. Hence, enforced disappearances are not a regional phenomenon or one rooted only in regimes perpetrating atrocities. It also occurs in countries with long-standing internal conflicts.<sup>10</sup> In other cases, enforced disappearances are used by governments to decimate indigenous populations<sup>11</sup> or they are associated to gender-based violence supported by the authorities.<sup>12</sup>

Consequently, the phenomenon has troubled the international community as it continues to proliferate and because the perpetrators usually remain unpunished. For over forty years, the international community struggles for a viable legal response to enforced disappearances. Its responses, though, have not always been to the benefit of the victims, or as influential as victims and their relatives would expect. Finally, the 2007 Convention seems to satisfy both states and civil society and to enhance all persons protection from disappearances.

### 3. INTERNATIONAL LEGAL RESPONSES TO ENFORCED DISAPPEARANCES

In the beginning, the international community treated the phenomenon of enforced disappearances *in casu* by appointing ad hoc Working Groups to monitor the application of human rights standards in Chile and Cyprus. Soon it became clear that a holistic approach was necessary and the General Assembly adopted resolution

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7 Organization of American States, 'Report on the Status of Human Rights in Guatemala' Inter-American Commission on Human Rights, OEA/SerL/V/II.53, Doc 22, rev 2 (Washington DC 13 October 1981) Chapter II; Organization of American States, 'Report on the Status of Human Rights in Chile' Inter-American Commission on Human Rights, OEA/SerL/V/II.34, Doc 21, corr 1 (Washington DC 25 October 1974) Chapter IX. The Pinochet regime did not provide information to the Commission, despite its numerous visits and special reports. Chile remained for many years a land of violence.

8 ECOSOC (n 1) para 12.

9 Ibid para 13.

10 UNCHR 'Report of the Working Group on Enforced or Involuntary Disappearances' (21 January 2004) UN Doc E/CN.4/2004/58, paras 322-323.

11 *Coronel and others v Colombia*, Human Rights Committee (HRC) (2002) UN Doc CCPR/C/76/D/778/1997; *Vicente and others v Colombia*, HRC (1997) UN Doc CCPR/C/56/D/612/1995.

12 *González et al ('Cotton Field') v Mexico*, Inter-American Court of Human Rights Series A No 205 (16 November 2009); UN Committee on the Elimination of Discrimination against Women 'Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention and reply from the Government of Mexico' (27 January 2005) UN Doc CEDAW/C/2005/OP.8/Mexico, paras 61-110.

33/173 on 'Disappeared Persons'<sup>13</sup> requesting the Human Rights Commission to 'consider the question of disappeared persons with a view to making appropriate recommendations'.<sup>14</sup> Thereinafter, the ECOSOC requested both the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities 'to consider the subject and make recommendations to the Commission on Human Rights'.<sup>15</sup> The Sub-Commission recommended the establishment of a group of experts to collect 'all the information ... and to make the necessary contacts with the Governments and the families concerned'.<sup>16</sup> The United Nations Working Group on Enforced or Involuntary Disappearances (UNWGEID) was established with a resolution adopted without a vote by the Commission on Human Rights.<sup>17</sup>

The establishment of the UNWGEID was not an easy task. As soon as disappearances became part of the UN human rights agenda, tensions grew between states over the appropriate way to address the phenomenon. The drafting of a legally binding instrument was out of the question for almost all delegations, because the phenomenon was relatively new in the international plane and there was a lack of knowledge about the issue.<sup>18</sup>

However, the majority of states had realized that there should be an international response to enforced disappearances and so they suggested the establishment of a thematic mechanism, the UNWGEID. By contrast, states that applied the policy of enforced disappearances (like Argentina and Uruguay) opposed the creation of the mechanism; instead, they preferred the adoption of resolutions which would only acknowledge the existence of enforced disappearances. At that point it was the dedication of human rights NGOs to achieve a long-term solution that proved instrumental. Having secured political and diplomatic support by the American delegation,<sup>19</sup> they tried to rouse public concern on enforced disappearances and pressure governments to reach an agreement. To this end they organized campaigns on enforced disappearances and released particular details on the applied governmental practices.<sup>20</sup> These activities in conjunction with incessant lobbying paved the way for the establishment of the UNWGEID. Even states that were initially opposing to its creation, finally conceded to it, as it was the only way to avoid further criticism of their policies. Overall, certain states considered the UNWGEID an important step against enforced disappearances, whereas others saw it as the least problematic approach on the topic.<sup>21</sup> Still, even under these circumstances, the creation of the UNWGEID reveals a conscious and alarmed international community.

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13 UNGA Res 33/173 (20 December 1978).

14 Ibid operative clause 2.

15 ECOSOC Res 1979/38 (10 May 1979).

16 UNCHR, 'Report of the Working Group on Enforced or Involuntary Disappearances' (1981) UN Doc E/CN.4/1435, Annex III.

17 UNCHR 'Question of Missing and Disappeared Persons' (1980) UN Doc E/CN.4/Res/1980/20, operative clause 1.

18 Rosemary Foot, *Rights Beyond Borders, The Global Community and the Struggle over Human Rights in China* (OUP 2000) 40.

19 William Korey, *NGOs and the Universal Declaration of Human Rights, "A Curious Grapevine"* (Palgrave 2001) 250.

20 Ann Marie Clark, *Diplomacy of Conscience Amnesty International and Changing Human Rights Norms* (Princeton University Press 2001) 17.

21 Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: in Search of a Sense of Community* (School of Human Rights Research 2006) 82-89.



In this context, the UNWGEID's mandate depended much on international politics. Indeed, the Group had a narrow but clear mandate to deal with disappearances that involved a degree of governmental involvement and liability. At the same time, it decided not to address disappearances associated with armed conflicts.<sup>22</sup> It also 'decided to approach its tasks in a humanitarian spirit',<sup>23</sup> meaning that in the context of Cold War it should not get involved in or criticize the member-states' domestic politics. It would instead seek governmental cooperation in order to function as a third party between the families of the disappeared and the liable governments. Thereafter the UNWGEID was heavily criticized for its dubious approach to the problem both by several human rights NGOs and authors. However, it was not the chosen approach that caused dissatisfaction, but the low rate of the cases that were resolved and the growing number of enforced disappearances worldwide.<sup>24</sup>

Apart from the UNWGEID's attempts to provide answers for the victims' fate, their relatives continued seeking the truth, either individually or through associations they had created. In a number of cases, their quest for justice led them to submit communications to the Human Rights Committee (HRC) under Article 5 of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

The views of the HRC set the foundations for the protection of individuals. In the first communication considered (*Eduardo Bleier v Uruguay*)<sup>25</sup> it found breaches of Articles 6, 7 and 10 of the ICCPR and held state authorities responsible for the fate of the individual.<sup>26</sup> The importance of HRC's conclusions lies in the reversal of the burden of proof that it established in cases of disappeared people.<sup>27</sup> The HRC held constantly that state parties have by definition more access to the necessary information than the individuals and their insufficient responses turn in favour of the complainants. The HRC also stated that the parties' undertaking to provide the Committee with the requested information follows their positive obligation to conduct full investigations as to the fate of the disappeared.<sup>28</sup> Unfortunately, the HRC's lack of enforcement capacity has proved to be an obstacle difficult to surmount. The 'naming and shaming' strategy that has been developed by the HRC seems to be an inadequate tool to deter enforced disappearances, let alone that this process was still in its infancy at that time. Therefore, it signaled a considerable advance when the Inter-American system for the protection of human rights accepted the challenge to cope with enforced disappearances and bring the perpetrators to justice.

The Inter-American Court of Human Rights (IACHR) proved to be a leading authority in disappearances. On 23 July 1988 the IACHR held a 'landmark ruling'<sup>29</sup>

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<sup>22</sup> UNCHR (n 16) para 3.

<sup>23</sup> *Ibid* para 30.

<sup>24</sup> JD Livermore and BC Ramcharan, "Enforced or Involuntary Disappearances": An Evaluation of a Decade of United Nations Action' (1989-1990) 6 CHRYB 217, 217-230.

<sup>25</sup> *Bleier v Uruguay*, HRC (1982) UN Doc CCPR/C/15/D/30/1978.

<sup>26</sup> *Ibid* para 13.

<sup>27</sup> *Quinteros v Uruguay*, HRC (1983) UN Doc CCPR/C/OP/2, para 11.

<sup>28</sup> *Arévalo v Colombia*, HRC (1989) UN Doc CCPR/C/37/P/181/1984, para 10; UNHRC, Sixteenth Session 1982, 'General Comment No. 06: The right to life (art.6)' (30 April 1982) para 4.

<sup>29</sup> Linda Drucker, 'Governmental Liability for "Disappearances": A Landmark Ruling by the Inter-American Court of Human Rights' (1988-1989) 25 Stan J Int'l L 289.

concerning the *Velásquez Rodríguez Case*.<sup>30</sup> The case is of paramount importance not only regarding the domain of enforced disappearances, but also for the protection of human rights in the Inter-American system in general, since it was the first time that the IACHR applied its compulsory jurisdiction in a contested case.<sup>31</sup> Moreover, the case is pivotal because the Court established special evidential standards regarding the practice of enforced disappearances and for the first time a state was held responsible for performing disappearances. More specifically, the Court lowered the required threshold of evidence as it acknowledged that one of disappearances' main aims is to efface all evidence<sup>32</sup> and held that 'circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts'.<sup>33</sup> In a unanimous ruling it found Honduras responsible for the disappearance of the victim. In doing so it declared the violation of several rights of the ACHR, as disappearances were not stipulated *per se* in the Convention. Furthermore, the Court held that the violation of these rights was in direct conjunction with the obligation of state parties of the ACHR to organize their legal orders in a way that it guarantees the protection of human rights (Article 1(1)). Consequently, it was established that enforced disappearances were violating the ACHR's values, *in toto*.<sup>34</sup>

The ruling created a leading precedent for the Inter-American legal order and confirmed the awareness of this regional community on enforced disappearances. The Court used exactly the same argumentation in the cases to follow and pinpointed that their common feature is the purpose of weakening political opponents<sup>35</sup> and intimidating the population.<sup>36</sup> It regarded disappearances as part of a general and systematic practice applied by governments. The Court, though, drew away from this line of argumentation in some of the ensuing cases of enforced disappearances it dealt with, with the view to strengthen the procedural aspects of the trials. In the case of *Caballero-Delgado and Santana v. Colombia* the Court affirmed that disappearances may arise on an occasional basis and not as part of a systematic practice.<sup>37</sup> In this case, uncontested evidence was presented on behalf of the victims regarding their disappearance and subsequent execution. The existence of strong evidence determined the Court's decision to a great extent. By contrast, in cases where evidence was insufficient to either indicate a governmental practice on disappearances or the victims' mistreatment and suffering, the Court did not pronounce a violation of the ACHR.<sup>38</sup>

The plethora of reported cases revealed the phenomenon's diffusion as well as the cruelty it entailed. The attempts of the HRC and the IACHR to deal with enforced

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30 *Velásquez-Rodríguez v Honduras*, Inter-American Court of Human Rights Series C No 4 (29 July 1988).

31 Claudio Grossman, 'Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation' (1991-1992) 15 *HastingsInt'l&CompLRev* 363.

32 *Velásquez-Rodríguez v Honduras* (n 30) para 131; *Fairén-Garbi and Solís-Corrales v Honduras*, Inter-American Court of Human Rights Series C No 6 (15 March 1989) para 127.

33 *Velásquez-Rodríguez v Honduras* (n 30) paras 130, 188.

34 *Ibid* (n 30) para 158.

35 *Godínez-Cruz v Honduras*, Inter-American Court of Human Rights Series C No 5 (20 January 1989) para 154b(i).

36 *Caracazo v Venezuela*, IACHR Series C No 58 (11 November 1999); *Blanco Romero v Venezuela*, Inter-American Court of Human Rights Series C No 137 (28 November 2005).

37 *Caballero-Delgado and Santana v Colombia*, Inter-American Court of Human Rights Series C No 22 (8 December 1995).

38 *Fairén-Garbi and Solís-Corrales v Honduras* (n 32) paras 157-158.



disappearances stumbled at the lack of established international standards that would provide for a common understanding and legal basis. It gradually became evident that the phenomenon of enforced disappearances could not be captured by reference to already existing norms. The need for a more thorough and effective approach, based on a set of basic legal principles was evidently obvious.

The international community took prompt action leading to the adoption of the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearances (hereinafter 1992 Declaration).<sup>39</sup> Some of the factors which finally led to the adoption of the Declaration include public awareness and the constant pressure from NGOs towards the drafting of Conventions on Enforced Disappearances, the adoption of the Convention Against Torture (CAT 1984) and the recommendations made by the UNWGEID.<sup>40</sup> Soon after the Declaration, the Organization of American States (OAS) adopted the Convention on Forced Disappearance of Persons.<sup>41</sup> It was the first legally binding document, which tackled the phenomenon directly, tailored to the idiosyncrasy of the regional plane it was designed for. Overall, this Convention enhanced the Inter-American system for the protection of human rights and promoted democratization in Latin America countries.

All the same, there were a few occasions where international courts displayed very 'limited understanding of the phenomenon'<sup>42</sup> as they applied formalistic criteria. This happened particularly when the European Court of Human Rights (ECHR) first dealt with enforced disappearances in 1998. As discussed below, the ECHR's jurisprudence proved inconsistent with the approach of the HRC and the IACHR so far. It may be said that different circumstances ask for a different approach, yet there were some instances when the Court's judgments were simply deficient. The vast majority of the cases tried by the ECHR were related to Turkey. They were associated with the internal disturbances in the south-eastern region of the country, which is mostly populated by Kurds.<sup>43</sup> The Court, though, did not acknowledge that disappearances were systematically practiced there and tried them on an *ad hoc* basis. Its approach diverged from the one already established by the IACHR.<sup>44</sup> Moreover, in contrast to the approach of the IACHR and the HRC, the ECHR decided to apply high evidentiary standards. Thus, it did not accept that a reversal in the burden of proof was necessary and did not lower the evidentiary threshold as it demanded proof 'beyond reasonable doubt'.<sup>45</sup> As a result, the applicants had to present information they could not access, which is in effect 'a sort of *probatio diabólica*'.<sup>46</sup> On top of that, the ECHR created a quantitative formula when it came to violations of

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39 UNGA Res 47/133 (18 December 1992) UN Doc A/47/49. The UNWGEID was assigned to report any obstacles during its application and to monitor its implementation in the member-states (an expansion of its mandate), UNCHR 'Report of the Working Group on Enforced or Involuntary Disappearances' (1994) UN Doc E/CN.4/1994/26, para 74.

40 ECOSOC (n 1) para 44.

41 OAS, 'Inter-American Convention on Forced Disappearance of Persons' General Assembly Res AG Res 1256 (XXIV-O/94) (Belem Do Para 6 September 1994).

42 T Scovazzi and G Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Martinus Nijhoff Publisher and VSP 2007) 191.

43 *Çakici v Turkey*, App no 23657/94 (ECHR, 8 July 1999); *Ismail Ertak v Turkey*, App no 20764/92 (ECHR, 9 May 2000); *Tas v Turkey*, App no 24396/94 (ECHR, 14 November 2000); *Ciçek v Turkey*, App no 25704/94 (ECHR, 27 February 2001).

44 Irum Taqi, 'Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach' (2000-2001) 24 *Fordham Int'l LJ* 940, 966-967.

45 *Kurt v Turkey*, App no 24276/94 (ECHR, 25 May 1998) paras 99, 107.

46 Scovazzi and Citroni (n 42) 190.

the right to life.<sup>47</sup> It held that the victims could be presumed dead only when a considerable period of time had passed without any news from the disappeared<sup>48</sup> which left unanswered questions as to the status of people who disappeared not long ago. It was not until recently, that the ECHR adopted a more flexible approach and acknowledged the relation between enforced disappearance and the threat of death. In the case of *Baysayeva v. Russia* it held that disappearances are life-threatening, when the victims disappear under violent circumstances.<sup>49</sup> However, there are some positive aspects in the ECHR's jurisprudence, especially when it comes to member-states' duties under the European Convention of Human Rights (ECHR). The Court held that states have a duty to effectively investigate every case of disappearance. This duty emanates from the general obligation established under Article 2 of the ECHR to 'protect the right to life by law'. Therefore, member-states have to conduct prompt and profound investigations on the fate of the disappeared as soon as they take notice of it; their failure to do so constitutes a breach to the ECHR. In other words, the Court did not easily pronounce a violation of the right to life resulting from a disappearance, however it required states investigate the alleged violation,<sup>50</sup> compensating for its hesitance to presume the victims' deaths.

Despite serious developments on the international level – such as the adoption of the 1992 Declaration and the progressive evolution of jurisprudence – there were still unsolved issues, which hindered a satisfactory response to the phenomenon. Such inconsistencies could not be easily surmounted without a universal instrument which would directly address the main issues of the phenomenon. In 1998 the Sub-Commission on the Promotion and Protection of Human Rights adopted a Draft International Convention on the Protection of all Persons from Forced Disappearance<sup>51</sup> (1998 Draft), which shed light on key aspects of the phenomenon. Moving forward and capitalising upon previous efforts, the Commission on Human Rights adopted without a vote resolution 2001/46, according to which an independent expert (Prof. Manfred Nowak, a former member of the UNWGEID) had to examine the existing international human rights' framework on enforced disappearances and report on the necessity of a 'legally binding normative instrument'.<sup>52</sup> Reaffirming the strong concern of the international community, the resolution established an 'Inter-sessional Open-ended Working Group (ISWG) to elaborate a draft legally binding instrument for the protection of all persons from enforced disappearance',<sup>53</sup> having taken into consideration the recommendations of the expert. Professor Nowak concluded that a legally binding instrument was essential for establishing protection against disappearances, since there existed gaps regarding, *inter alia*, the definition of the term, the perpetrators' punishment and the phenomenon's prevention. Thus, he proposed three possible forms:

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47 Carla Buckley, 'The European Convention on Human Rights and the Right to Life in Turkey' (2001) 1 HumRtsLRev 35, 55-64.

48 In the case of *Timurtaş v Turkey*, the ECHR set a very high threshold of six and a half years, to presume the victim's death. *Timurtaş v Turkey*, App no 23531/94 (ECHR, 13 June 2000) paras 82-86.

49 *Baysayeva v Russia*, App no 74237/01 (ECHR, 5 May 2007) para 119.

50 *Mahmut Kaya v Turkey*, App no 22535/93 (ECHR, 28 March 2000) paras 342-343.

51 UNCHR 'Report of the sessional working group on the administration of justice (1998) UN Doc E/CN.4/Sub.2/1998/19, Annex.

52 UNCHR Res 46 (2001) UN Doc E/CN.4/2001/46, para 12.

53 *ibid.*

'a separate human rights treaty such as the draft convention, an optional protocol to the International Covenant on Civil and Political Rights, or an optional protocol to the Convention against Torture.'<sup>54</sup>

It was then upon the ISWG to decide the form of the document. The Working Group decided that a separate treaty would be the most appropriate form<sup>55</sup> and in 2005 it submitted a draft to the Commission on Human Rights.<sup>56</sup>

Finally, the International Convention for the Protection of All Persons from Enforced Disappearance (Convention) was adopted by the newly created Human Rights Council and consecutively by the Third Committee and the General Assembly.<sup>57</sup> It entered into force on 23 December 2010 and it now counts 32 members and 91 signatories. As the European Union representative stated during the GA Plenary Session, the Convention 'sends a strong political signal from the international community that this shameful and still widespread practice must come to an end'.<sup>58</sup>

Indeed, the Convention fills serious gaps in the protection against disappearances. The creation of the right not to be subjected to enforced disappearance alongside the definition of disappearance are probably the most important achievements of the Convention. The creation of a comprehensive, protective legal framework requires the phenomenon's crystallization. Accordingly, the Convention's definition is the starting point for understanding all persons' right not to be subjected to enforced disappearance, but also for grasping the concepts and values of the Convention.

#### **4. ENFORCED DISAPPEARANCES: THE QUEST FOR A WIDELY ACCEPTED AND COMPREHENSIVE DEFINITION**

The definition of enforced disappearances proved to be an issue of legal and political controversy.<sup>59</sup> During the last years, disappearances have been labeled by a diversity of characterizations, which were used almost indistinguishably.<sup>60</sup> As a result, once disappearances attracted international concern, shedding light on the content of the term proved to be a difficult task.

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54 ECOSOC (n 1) para 97.

55 UNCHR, 'Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances' (2004) UN Doc E/CN.4/2004/59.

56 UNCHR, 'Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances' (2005) UN Doc E/CN.4/2005/66.

57 UNGA 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"' (23 June 2006) 1<sup>st</sup> Session (2006) UN Doc A/HRC/1/L.2; UNGA 'Report of the Third Committee' (6 December 2006) 61<sup>st</sup> Session (2006) UN Doc A/61/448, para 27; UNGA Res 61/177 (12 January 2007) UN Doc A/Res/61/177.

58 UNGA 'Verbatim Record' (20 December 2006) UN Doc A/61/PV.82, 3.

59 UNCHR, 'Report of the Working Group on enforced or involuntary disappearances' (1998) UN Doc E/CN.4/1999/62.

60 Characterizations varied from forced, enforced, involuntary, to political or even systematic. HM Kleinman, 'Disappearances in Latin America: A Human Rights Perspective' (1986-1987) 19 NYU J Int'l L & Pol 1033, 1033.

Human rights NGOs were the first to respond to the need for ‘conceptual clarity’.<sup>61</sup> From the early 1980s, NGOs engaged in a strenuous quest for a definition; yet all definitions have been descriptive and followed an analytical approach of the practices developed by governments. The UN was also in search of a definition, but it did not come to any until the adoption of the 1992 Declaration. That definition came as the precursor of the one which states parties concluded in the 2006 United Nations’ Convention, however it was not a part of the Declaration itself, but only a preambular clause. The 1992 Declaration has proven instrumental, since it ‘proclaims’ itself ‘as a body of principles for all states’<sup>62</sup> and is the first international document to declare that ‘any act of enforced disappearance is an offence to human dignity’, thus violating a series of human rights. Moreover, the act of enforced disappearance also constitutes an offence under criminal law. This conceptualization clearly illustrates the reasons why the 1992 Declaration was a landmark; it established a definition at the international level and stipulated that enforced disappearances should be treated as offences under the domestic legal orders. The indispensability of the definition is due to the fact that an offence (enforced disappearance) had been acknowledged. Thus a domestic legal order should prevent and punish such acts. Given this evident correlation between the definition and the offence and their parallel lives, it could be argued, that despite its preambular placement, the definition has been functionally incorporated into the main part of the Declaration. Moreover, the 1992 Declaration remains important even after the adoption of the Convention, since

[i]t sets forth a set of rules that all the Member States of the United Nations, without the requirement of a ratification are called upon to apply as a minimum to prevent and suppress the practice,<sup>63</sup>

and because it might be also considered of customary value.<sup>64</sup>

The definition given is principally based on the ‘working definition’ adopted by the UNWGEID in its annual reports.<sup>65</sup> The UNWGEID in its general comments on the Declaration stated the elements that a definition of enforced disappearance should include three minimum cumulative elements, which are:

a) deprivation of liberty against the will of the person concerned, b) involvement of governmental officials, at least indirectly by acquiescence, c) refusal to disclose the fate and whereabouts of the person concerned.<sup>66</sup>

These elements are interconnected and reveal the historicity and complexity of the crime.<sup>67</sup> However, this offence presupposes that there exists governmental involvement or at least awareness of the perpetration of the crime, obviously

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61 Jan Egeland, ‘Political “Disappearances” – A Challenge for Humanitarian Law’ (1982) 51 *Nordisk Tidsskrift Int’lRet* 189, 189.

62 UNGA Res 47/133 (n 39) operative clause 1.

63 UNHCHR ‘Enforced or Involuntary Disappearances’ (Geneva 2009) UN Doc Fact Sheet No.6/Rev.3, 6.

64 Gabriella Citroni and Tullio Scovazzi, ‘Recent Developments in International Law to Combat Enforced Disappearances’ (2009) 3 *Revista Internacional de Direito e Cidadania* 89, 93.

65 ECOSOC (n 1) 70.

66 UNCHR, ‘Report of the Working Group on enforced or involuntary disappearances’ (1996) UN Doc E/CN.4/1996/38, para 55.

67 UNCHR, ‘Report of the Working Group on enforced or involuntary disappearances’ (1983) UN Doc E/CN.4/1984/21, para 178.

rendering the above provision useless, if there is no political will to punish the crime and suppress this practice.<sup>68</sup>

The significance of the progress made in 1992 is beyond doubt. Apart from establishing 'the autonomous nature of the crime'<sup>69</sup> it gave impetus to a broader debate upon the issue. Therefore the next step deemed essential was the creation of a right *per se*, not to be subjected to enforced disappearance. Article 1 of the Convention established a new right, using a negative formulation, and after intensive negotiations the state-parties finally concluded a definition (Article 2).

The term 'enforced disappearance' was the focal point during the negotiations as it would naturally entail specific state obligations. The definition given in Article 2 of the Convention follows the pattern of the 1992 Declaration, but the formulation of the term is substantially different, although phrasal alterations seem slight. Article 2 reads as follows:

“[e]nforced 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 will place such a person outside the protection of the law.

The term is analyzed in three elements according to the dominant approach. It is explicitly stated that the deprivation of liberty is the first element of an enforced disappearance. The final phrasing is the outcome of negotiations, a compromise between the proposals made during the sessions of the ISWG. The initial wording, proposed in the Working Group by the Chairperson-Rapporteur referred to 'the deprivation of a person's liberty, in whatever form'.<sup>70</sup> The follow up debate brought to light two different trends. Some states endorsed the Chairperson's suggestion, with a view to ensuring full protection, whereas other states considered the phrasing 'imprecise',<sup>71</sup> thus calling for the use of more specified terms. Although, the use of specified terms such as arrest, detention and abduction would be 'by way of example',<sup>72</sup> meaning that the listing in the definition is not exhaustive, it seems that the delegations sought for clarity in the definition in order to limit ambiguity.

However, these terms do not only serve as examples in the context of the Convention. Their explicit enumeration, signals that they constitute essential components of a 'disappearance'.<sup>73</sup> They form part of the crime, an element of it (*actus reus*).<sup>74</sup> Finally, these terms are of considerable conceptual value, because they

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68 Report of the Working Group on enforced or involuntary disappearances (n 66) para 51.

69 Citroni and Scovazzi (n 64) 92-93.

70 UNCHR (n 56) para 17.

71 UNCHR (n 55) para 20.

72 UNCHR (n 56) para 19.

73 *Gangaram-Panday v Suriname*, Inter-American Court of Human Rights Series C No 16 (21 January 1994).

74 This approach differs from the one the ECHR follows. For the ECHR, a disappearance is an 'aggravated form of arbitrary detention'. For that reason, the Court finds it important that the disappeared were last seen in custody by governmental authorities. The Convention focuses on deprivation of liberty as well, but it does not treat it as a prerequisite for a disappearance to occur. *Orhan v Turkey*, App no 25656/94 (ECHR, 18 June 2002) paras 265, 278; *Tekdag v Turkey*, App no 27699/95 (ECHR, 15 January 2004) paras 66, 68.



are invoked in the most important international human rights instruments and their content has been enriched through the interpretation of international courts and tribunals over the years.

Another contested issue during the negotiations was that of lawfulness. Some delegations expressed the opinion that only cases of unlawful deprivation of liberty should be included.<sup>75</sup> But the majority of states did not welcome this approach opining that it would dramatically limit the term's field of application. Besides, jurisprudence,<sup>76</sup> as well as the UNWGEID's experience had also shown that the deprivation of liberty was essentially related to the third element of a disappearance, namely refusal to acknowledge the deprivation and concealment of the fate or whereabouts of the victim, indicating that lawful arrests or detentions could turn into disappearances.<sup>77</sup>

The third element of the term<sup>78</sup> depicts the denial of the proper national authorities to cooperate with the relatives or the counsel of the victim and inform them about his/her fate. It is not surprising that national authorities might refuse the deprivation of liberty itself<sup>79</sup> or details about it and as a result erase all traces of the victim. This element is not only related to factual circumstances but it is also critical in achieving one of the two aims of the Convention, that of prevention and it should be read together with Articles 18 to 20. Article 18 refers to the right to information of the people with a legitimate interest and lists the accessible information, whereas Article 20 frames the exception, spelling out when the state can refuse the provision of information about the detained person. This article caused disagreement until the end of negotiations of the ISWG, as it was thought to distort the instrument and render it ineffective. The drafters of the Convention were aware of the fact that this provision could serve as a 'Trojan Horse', capable of bringing the Convention's implementation to a standstill; thus they explicitly restricted its scope of application through the establishment of both affirmative and negative requirements. In any event, though, Article 2 enjoys normative supremacy over Article 20 and in case of conflict it prevails (Article 20(1)).

However, ambiguity does not arise from the priority to be accorded the two provisions, but rather from which 'conduct' is deemed permissible. During the negotiations, some delegations opted for exceptions to the right to information on the grounds of witness protection, threats to national security, and the protection of the detainee's integrity, whereas others proposed for the postponement of the information provision instead of refusal.<sup>80</sup> Overall, it seems that articles 2, 18 and 20, on their proper interpretation protect the right to information. As a result, a

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75 UNCHR, 'Report of the Working Group on enforced or involuntary disappearances' (2004) UN Doc E/CN.4/2004/59, para. 21.

76 *Cantoral-Benavides v Peru*, Inter-American Court of Human Rights Series C No 69 (18 August 2000) paras 90-91; *Neira-Alegría et al v Peru*, Inter-American Court of Human Rights Series C No 20 (19 January 1995).

77 UNWGEID, 'General Comment on the Definition of Enforced Disappearance' para 7 <<http://www2.ohchr.org/english/issues/disappear/links.htm>> accessed 3 June 2012.

78 For the sake of coherent argumentation it is discussed before the second one.

79 *Castillo-Páez v Peru*, Inter-American Court of Human Rights Series C No 34 (3 November 1997) para 58.

80 UNCHR, 'Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons from Enforced Disappearances' (2006) UN Doc E/CN.4/2006/57, paras 16-29.



systemic interpretation would ensure maximum protection for the victim and his/her relatives as well.

The last part to examine is the one related to the status of the perpetrators (the second element of the definition). According to Article 2, the perpetrators should be 'agents of the State or persons or groups of persons acting with the authorization, support or acquiescence of the State'. Thus enforced disappearances are committed only by state actors, either direct or indirect. Non-state actors are excluded from the definition and Article 2 cannot be applied to them, not even by analogy, since there is special provision for them (Article 3). This approach caused dissatisfaction during the negotiations and proved to be a hard case, as members of the ISWG agreed only in the last section. It has been argued that the UNWGEID and the ISWG have adopted a 'traditional notion' on this topic, since they left out non-state actors.<sup>81</sup>

However, a careful reading of ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) reveals what non-state actors stand for in the law of state responsibility and which entities are finally excluded from the Convention's definition. As Special Rapporteur James Crawford points out, human rights supporters have long demanded the abandonment of a 'firm distinction between the State and the private sector' when the international law of state responsibility is applied to human rights instruments.<sup>82</sup> The request, though, for 'extension of state responsibility in the private sector' is considered to be 'undue'.<sup>83</sup> According to the ARSIWA in a number of cases, non-state actors' acts are attributed to the state, namely when they serve as agents of the state, when they function under the direction or the control of a state and lastly when armed opposition groups are guided by the state.<sup>84</sup> Even if the ARSIWA guarantee in this manner that there shall be no impunity for non-state actors by equating them to indirect state actors, there are still arguments to explain why this does not correspond specifically to the practice of disappearances. The most convincing amongst them, is that in disappearances it is almost impossible to prove who committed the crime and further on, whether there was state involvement or not.<sup>85</sup> The issue of non-state actors provoked serious discord during the sessions. The Chairperson managed to reach a compromise with the inclusion of Article 3. This article was cautiously phrased, as it refers to 'acts defined in article 2' and not to enforced disappearances, implying that the acts are characterized as such only when there is state involvement. The provision acknowledges states' discretion in this field.<sup>86</sup> In the meantime it lowers the victim's protection as these acts fall outside the *ratione materiae*.<sup>87</sup> The most

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81 Civil and Political Rights, Including Questions of: Disappearances and Summary Executions (n 1) para 73.

82 James Crawford, 'Human Rights and State Responsibility' (12<sup>th</sup> Raymond & Beverly Sackler Distinguished Lecture Series, Thomas J. Dodd Research Centre, University of Connecticut, 25 October 2006) para 1 <<http://doddcenter.uconn.edu/dd/events/sackler/Crawford%20transcript.pdf>> accessed on 3 June 2012.

83 Ibid para 5.

84 Ibid para 2.

85 The case is more complicated in countries where both state actors and non-state actors (usually opposition groups) resort to disappearances, so as to weaken the opponents.

86 UNCHR, 'Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons from Enforced Disappearances' (2003) UN Doc E/CN.4/2003/71, para 35.

87 Susan McCrory, 'The International Convention for the Protection of All Persons from Enforced Disappearance' (2007) 7 Hum Rts L Rev 545, 551.

serious concerns were expressed by the associations of the families of disappeared persons and by NGOs who argued that the provision's scope may be distorted by governments in an attempt to justify their policies.

Overall, the above debate can be condensed into two conflicting propositions. First, state involvement is a *sine qua non* condition of enforced disappearance. Secondly, it is very difficult to prove state involvement in disappearances, especially when indirect. Thus, what seems appropriate (so as to avoid doctrinal aberrations and meet the phenomenon's particularity) is to adopt a wide interpretation of the ARSIWA and lower the applicable evidential threshold in cases where there are allegations of indirect state involvement. This view has already been introduced by the IACHR in the case *Masacre de Pueblo Bello v. Colombia*, where the Court held Colombia responsible for disappearances carried out by paramilitary groups.<sup>88</sup>

Still, the treatment of non-state actors committing enforced disappearances is not the most complex part of the definition. The last phrase of Article 2 'which place such a person outside the protection of the law' constitutes one of the major weaknesses of the whole text. More specifically, states disagreed on whether the placement of the victim outside the protection of the law was a fourth element of the definition (the subjective part of the crime, meaning that the intention of the perpetrators should be accordingly evidenced), or a mere consequence of any act of enforced disappearance. States having experienced enforced disappearances held that the placing of the victim outside the protection of the law was an 'inherent consequence' of an enforced disappearance.<sup>89</sup> On the other side, a number of states urged for an additional fourth constitutive element to the definition. They explained that it would be incompatible with their domestic penal systems to introduce a crime which would not ask for the establishment of the perpetrator's intention. Apart from that, they also referred to the definition provided by the Rome Statute of the International Criminal Court (ICC Statute) where intent is a critical element.<sup>90</sup> The debates left the issue unresolved and thus the Chairperson of the ISWG stated that states-parties 'were fully entitled to make an interpretive declaration on the matter at the time of ratification.'<sup>91</sup>

However, the interpretation of this phrase is found in documents prior to the Convention, and it leaves no doubt about the meaning of the text. According to UNWGEID the placement of a person outside the protection of the law is an aftermath of a disappearance.<sup>92</sup> Nowak and the ISWG during its early sessions also side with this view, as they identify only three constitutive elements in a disappearance and they expressly avoid reference to it as the fourth one. Nowak also underlies that it would be almost impossible to identify intent in the perpetrators' acts, as in most cases, they are trained to carry out specific tasks, for which they

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88 *Masacre de Pueblo Bello v Colombia*, Inter-American Court of Human Rights Series C No 140 (31 January 2006) paras 111-153.

89 UNCHR (n 80) para 91.

90 Federico Andreu-Guzmán, 'The Draft International Convention on the Protection of All Persons from Forced Disappearance' (2001) 62-63 *ICJ Review – Impunity, Crimes against Humanity and Forced Disappearance* 73, 79-80.

91 UNCHR (n 80) para 93. See also, the statement made by the United Kingdom after the Convention's adoption: UNGA 'Verbatim Record' (n 58) 2.

92 UNWGEID (n 77) para 7; UNCHR, 'Report of the Working Group on Enforced or Involuntary Disappearances' (2002) UN Doc E/CN.4/2002/79 para 365.

could only be held responsible.<sup>93</sup> Yet, the most explicit and clear statement which matches this view, is the one made in a UN experts' Joint Report on secret detention:

[T]he definition 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 concealment of the whereabouts and fate of the person.<sup>94</sup>

The fact that states did not embrace the approach set up by the UNWGEID during the last decades indicates that this issue touched upon the important matter of reserved jurisdiction and domestic policy. The issue gains even more importance when it comes to the evidentiary standard set for disappearances. If 'putting the victim outside the protection of law' is to be considered an element of the definition, then the alleged victims should prove that the perpetrators had *dolus* in doing so, which undoubtedly makes the evidentiary threshold higher.<sup>95</sup>

However, this debate was totally misleading. The purport of this phrase is properly revealed when examined in combination with the provisions of the OAS Convention. The relevant phrase in the OAS Convention is: 'thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees'.<sup>96</sup> Under the Inter-American system, 'outside the protection of the law' means that the victim is denied recourse to legal remedies. This is a material element which concerns the victim's case and not the perpetrator's defence, an aspect which was overlooked during the negotiations.

The fact that the ISWG Chairperson referred to it as the 'third and half element' of the definition, trying to reconcile all different views, did not remove ambiguity over this point. This is regrettable because it assigns priority to the crime of enforced disappearance passing over the right not to be subjected to it. In other words it sets guarantees for the protection of the potential perpetrator, minimizing the protection of the victim.

Notwithstanding the above controversies, the Convention's definition enjoys wide acceptance both by states and by human rights' NGOs. It is also a positive development regarding the identity of perpetrators, even if non-state actors are excluded from the definition. Overall, the definition is deemed a success, not only because it is comprehensive but also because it offers quite a broad definition which in turn may well correspond to a wide variety of methods that governments apply. The fact that it recognizes that any kind of deprivation of liberty may result in a disappearance is very important especially with regards to new methods to which governments resort to.

In this respect, contemporary practices of the 'War on Terror' have unfolded new aspects of the issue. In the name of national security many states launched anti-

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93 ECOSOC (n 1) paras 73-74.

94 UNHRC, 'Joint Study on Secret Detention of the Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on the Promotion and Protection of Human Rights & Fundamental Freedoms while Countering Terrorism, the Working Group on Arbitrary Detention & the Working Group on Enforced or Involuntary Disappearances' (2010) UN Doc A/HRC/13/42, para 28.

95 *Bazorkina v Russia*, App no 69481/01 (ECHR, 27 June 2006) para 167.

96 OAS (n 41) article 2.

terrorist campaigns and moved towards strict legislation, thus increasing the risk enforced disappearances to occur.

## **5. ENFORCED DISAPPEARANCES THROUGH THE ANTI-TERRORIST SPECTRUM**

The 'War on Terror' raised new issues for the law of enforced disappearances, regarding mainly the application of two key practices: incommunicado detentions and extraordinary renditions.

The aftermath of the 9/11 terrorist attacks reinforced the public interest concerning disappearances. On the grounds of the 'Global War on Terrorism' against the so called 'Axis of Evil', some states took austere legislative measures authorizing human rights' restrictions as a safeguard to national security, whereas other states went further and promulgated a state of emergency.

It is not the first time that such a policy has been implemented by states; since 1960s the language used by the Latin American authoritarian regimes identified military or paramilitary groups as subversives or terrorists.<sup>97</sup> Yet now, the situation is different due to the fact that this policy is adopted by democratically elected governments and generally by countries which are often referred to as liberal democracies. In addition, the operations carried out after 9/11 against terrorism are unprecedented in terms of their intensity and state cooperation in intelligence sharing.

One of the effects of these draconian laws was the substantial increase in suspects' detentions which were mainly secret or incommunicado. States embarked on new techniques as well, which resulted in the lowering of the applicable human rights standards. Thus, enforced disappearances came to the fore once more, as a result of these circumstances.

### **5.1 Incommunicado Detentions**

It has been already mentioned that a deprivation of liberty is just one of the three constitutive elements of an enforced disappearance. Also, according to the definition in the 2007 Convention every kind of deprivation of liberty might turn into a disappearance. Indeed, some methods place the detainee under an incredibly high risk and result almost always in a disappearance. 'Incommunicado detention' is, in these terms, a means of erasing all traces of the victim. The term describes the detainee's absolute confinement from the outside world. The victim is not allowed to communicate with people other than his/her captors.

The implications of incommunicado detention are several and relate mostly to the victim's protection. The victim is unable to notify his family of this new situation and the reasons for his custody and also cannot consult a lawyer. His confinement indicates a further denial by the victim's captors to bring him/her before the

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<sup>97</sup> *Bámaca-Velásquez v Guatemala*, Inter-American Court of Human Rights Series C No 70 (25 November 2000) para 121(b), (d); *The 19 Tradesmen v Guatemala*, Inter-American Court of Human Rights Series C No 108 (5 July 2004) para 84(a), (h).

judiciary.<sup>98</sup> Because of these restrictions, the detainee's treatment is in the captors' absolute discretion and may 'invite other forms of coercion'.<sup>99</sup>

Incommunicado detention is not a novel practice and has already been addressed by the international community.<sup>100</sup> The question though, is whether an incommunicado detention may amount to, or result in an enforced disappearance, given the human rights' curtailments that states have already introduced and are willing to undertake under their anti-terrorist campaigns. The UNWGEID has stressed the potential relationship between the two since 2003.<sup>101</sup> According to UNWGEID's Reports and the Convention, incommunicado detention falls under the states' obligation to take preventive measures against disappearances and to refrain from using any methods that endanger a detainee's security. The Convention does not mention incommunicado detention *expressis verbis*, but it can be argued that it implies it in article 17(2)(d) (read in conjunction with article 17(1) which refers to secret detention):

[...] [e]ach State Party shall, in its legislation: Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law.

The Convention's rationale denotes that the drafters understood incommunicado detention as a particular form that secret detention may attain (incommunicado detention is an aspect of secret detention: article 17(2) seeks to address the violations a person suffers when secretly detained). Contrary to this view, some commentators place incommunicado just before disappearances in the scale of severity. In other words, an enforced disappearance is considered 'a heinous form of incommunicado detention'.<sup>102</sup> Apparently this view misconceives the complexity of an enforced disappearance; however, the value of equating these two practices is obvious only exceptionally when it comes to the newly developed anti-terrorist policies.

In the post 9/11 era, incommunicado detentions are standard tools to confront terrorism and to avert future attacks. The scope of the undertaken measures is not the individual's extermination (as it was in the 1960s), but the weakening of the terrorist organization's structures. Thus, the captors aim at the extraction of the best available information. To that end, a detainee's confinement enables the authorities to apply severe interrogation techniques affecting his/her treatment,<sup>103</sup> but not concluding in torture that will cause irreparable damage or in extrajudicial

98 Nigel S Rodley, *Treatment of Prisoners under International Law* (3<sup>rd</sup> edn, OUP 1999) 333-334.

99 M Bator and J Vorenberg, 'Arrest, Detention, Interrogation and the Rights to Counsel: Basic Problems and Possible Legislative Solutions' (1966) 66 CLMLR 62, 71-72.

100 Economic and Social Council 'Standard Minimum Rules for the Treatment of Prisoners' Res 663C (XXIV) (31 July 1957) Annex 1, principles 37-38; UNGA, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' (9 December 1988) UN Doc A/Res/43/173, Annex, Principles 16, 19; Tullio Treves, 'The UN Body of Principles for the Protection of the Detained or Imprisoned Persons' (1990) 84 AmJInt'lL 578, 581-582.

101 UNCHR, 'Report of the Working Group on enforced or involuntary disappearances' (2003) UN Doc E/CN.4/2003/70, 3.

102 Sarah Joseph et al, *Seeking Remedies for Torture Victims, A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (World Organization Against Torture 2006) 170.

103 S Marks and A Clapham, *International Human Rights Lexicon* (OUP 2005) 77.



executions. This, of course, does not guarantee humane treatment for detainees. Recent statistics prove that ill-treatment is almost inevitable during incommunicado detention<sup>104</sup> and detainees are exposed both to physical and mental suffering.

Furthermore, confinement enables the authorities to leave the suspects incommunicado for a prolonged period (this tactic apart from the detainees' debilitation also ensures that there is no communication with other suspected terrorists), which constitutes per se cruel inhuman and degrading treatment<sup>105</sup> and is a *prima facie* violation of the ICCPR<sup>106</sup> and of the IACHR.<sup>107</sup> The data available shows that terrorist suspects are usually held incommunicado for months or even years,<sup>108</sup> while the HRC held as early as in 1979 that even 6 weeks of incommunicado detention is a breach of the Covenant.<sup>109</sup> In addition, the ECHR found a fourteen days incommunicado detention to be exceptionally long, even when there is a state of public emergency because of a terrorist threat.<sup>110</sup> Prisoners that are under prolonged incommunicado detention are usually referred to as 'Ghost Detainees'. This term describes eloquently the detainees' absolute alienation from the society and that their very existence depends solely on the information they possess.

It seems that prolonged confinement and severe interrogation methods applied to alleged terrorists fulfill all the requirements of Article 2 of the Convention and set up the causal link between incommunicado detentions and enforced disappearances. Obviously, the current conditions of terrorism suspects' detentions leave no doubt that these individuals are eventually disappeared under human rights standards for so long as they are in confinement. The key element is that the state also refuses to acknowledge their detention and whereabouts. The fact that at some point they may be put on trial or get released does not affect their characterization as disappeared, since neither the 2007 Convention nor international jurisprudence ask for the victim's death or interminable capture.<sup>111</sup> This, also, does not reduce their next of kin's anguish over their fate. Their relatives cannot be aware of the patterns that intelligence services follow and therefore they fear for the detainees' life.

The extensive application of incommunicado detentions in the 'War on Terror' might also mark a turn in enforced disappearances' jurisprudence. So far, the international human rights courts have in the majority of cases presumed the victim's death because there were allegations of ill-treatment. However, contemporary enforced disappearances occur under different conditions. As victims are likely to reappear, courts should be more cautious in presuming their death; this clearly indicates that disappearances could be dissociated from the right to life.

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104 Roland D Crelinstern, 'Violence in Prisons/Torture' in Wilhelm Heitmeyer and John Hagan (eds) *International Handbook of Violence Research* (Kluwer Academic Publishers 2003) 189.

105 UNCHR, Forty-fourth Session 1992, 'General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art.7)' (10 March 1992) para 6.

106 *López Burgos v Uruguay*, HRC (1981) UN Doc CCPR/C/13/D/52/1979 paras 11.5-11.6.

107 *Suárez-Rosero v Ecuador*, Inter-American Court of Human Rights Series C No 35 (12 November 1997) paras 48-52.

108 International Committee of the Red Cross, 'Report on the Treatment of 14 'High Value Detainees' in CIA Custody' 2007 (Washington 14 February 2007) 7, 8 <<http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>> accessed 3 June 2012.

109 *Caldas v Uruguay*, HRC (1979) UN Doc CCPR/C/19/D/43/1979 para 14.

110 *Aksoy v Turkey*, App no 21987/93 (ECHR 26 November 1996) para 78.

111 *Mónaco v Argentina*, HRC (1995) UN Doc CCPR/C/53/D/400/1990 paras 2.1, 10.4; *Loayza-Tamayo v. Peru*, IACHR Series C No 33 (17 September 1997) para 46(c), (e), (f).



Although, it could be argued that a shift in international jurisprudence comes dimly into sight,<sup>112</sup> it is rather premature to deem a general change since jurisprudence is only now evolving on the issue.

## 5.2 Extraordinary Renditions

The anti-terrorism measures have reasonably incited domestic criticism in the states that adopted them. Human rights NGOs and the mass media stressed the legal contraventions they entailed and further enumerated their inconsistencies both with domestic laws and international obligations. As a result, public opinion started opposing some of the adopted rules, despite the fact that terrorism remains on top of the agenda regarding national security and is still considered as a potential danger. Therefore, governments faced constant pressure to disclose information about the detention conditions of terrorist suspects while their refusal to do so exacerbated domestic reactions. Some states in an attempt to evade accusations for human rights violations (at least regarding domestic legal standards) turned to other methods. That was the critical point when extraordinary renditions became a commonly applied tool in the War on Terror, also affecting enforced disappearances.

‘Extraordinary rendition’ is neither a legal term nor an entirely new one.<sup>113</sup> In regard to enforced disappearances, it is well suggested that extraordinary renditions have been used by governments since the 1970s. At that time, intelligence services of several Latin American countries had created a network of information-sharing for alleged ‘subversives/terrorists’. This networking is also known as Operation Condor (Operación Condor).<sup>114</sup> However, this is a rather primitive form of the methods that states have developed after 9/11.

Indeed, extraordinary rendition is now used to describe the transfer of alleged terrorists from the country where they are apprehended to states with underdeveloped and poor human rights protection. In other words, it is a forcible transboundary movement,<sup>115</sup> a complex method which requires the cooperation of at least three countries: the captor, the accomplice and the extractor state. The suspect is usually caught in the borders or in airports of a country (the accomplice state) by secret agents of another country (the captor state). The victim is then taken to a third country, where he is held in custody and interrogated (the extractor state). In most cases, the interrogation takes place in secret detention centers, over which the captor state’s secret services exercise a significant degree of control. Extraordinary renditions have not been standardized up till now as there is not any standard pattern followed.<sup>116</sup> Despite several variations that have been recorded so far, there is a common feature in all such incidents: the element of extraterritoriality vis-à-vis

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112 *Jegatheeswara Sarma v Sri Lanka*, HRC (2003) UN Doc CCPR/C/78/D/950/2000 para 9.6.

113 Marguerite Feitlowitz, *A Lexicon of Terror: Argentina and the Legacies of Torture* (OUP 1998) 71; Paul Michell, ‘English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain’ (1996) 29 *Cornell Int’l LJ* 383, 389-390. Extraordinary renditions stood at the beginning as a synonym to the ‘Ker-Frisbie Doctrine’, a modern version of the *male captus bene detendus* maxim.

114 *Goiburú and others v Paraguay*, Inter-American Court of Human Rights Series C No 153 (22 September 2006).

115 Joan Fitzpatrick, ‘Rendition and Transfer in the War against Terrorism: Guantánamo and Beyond’ (2002-2003) 25 *LoyLA Int’l & Comp L Rev* 457, 461.

116 UNHRC, ‘Report of the Working Group on Enforced or Involuntary Disappearances’ (2007) UN Doc A/HRC/4/41, para 454.

the captor state. The suspects are apprehended, detained and interrogated abroad, yet on behalf of the captor state; moreover, the victims are foreign nationals.<sup>117</sup>

Captor states try to accomplish two goals through extraordinary renditions. First and above all, they prefer increased harshness during interrogations to yield the maximum benefit on intelligence gathering grounds. However, constitutional and legal guarantees in combination with effective enforcement mechanisms almost prohibit the use of severe techniques in their territory, as victims may ask for judicial protection. This explains the second goal, which is to fully deprive the transferred from access to their judicial system where they can challenge their treatment during detention.<sup>118</sup> In other words, the captor state tries by all means to avoid its domestic legislation and to create a 'legal *lacuna*'.

The detainees' lives are in jeopardy since extraordinary rendition reduces their legal protection to the bare-minimum, permitting grave human rights violations. Extraordinary renditions should be undoubtedly placed among practices to disappear individuals, as they are 'designed to evade public and judicial scrutiny, to hide the identity of the perpetrators and the fate of the victims'.<sup>119</sup> They also constitute 'a degrading and dehumanizing practice for the victims',<sup>120</sup> because they are aware of their inability to reach both the outside world and also the judiciary. It is this inability that equates extraordinary renditions to enforced disappearances and differentiates them from mere international abductions.<sup>121</sup>

The UNWGEID came round to this view in 2004 and further mentioned that the practice constitutes a breach to the 1992 Declaration.<sup>122</sup> It also came across extraordinary renditions when examining the complaint of Maher Arar. This is one of the very few complaints that have gained publicity until now, mainly due to efforts made by Canadian human rights NGOs and by the victim's wife. The victim, a national of Canada, was detained in an American airport while returning from Tunisia.<sup>123</sup> He was then transferred to Syria to be interrogated on his alleged links with Al-Qaeda, where he was kept nearly for a year. After his release Arar brought his claims before American Courts, only to be rejected on jurisdictional grounds.<sup>124</sup> This is indicative of the juridical difficulties the practice entails. So far, national courts have rejected similar claims based either on lack of jurisdiction or on aspects

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117 Scovazzi and Citroni (n 42) 42.

118 Mario Silva, 'Extraordinary Rendition: A Challenge to Canadian and United States Legal Obligations under the Convention against Torture' (2008-2009) 39 *CalWInt'lJ* 313, 317.

119 Joint Hearing Before the Subcommittee on International Organizations, Human Rights: An Oversight and the Subcommittee on Europe of the Committee on Foreign Affairs House of Representatives 110<sup>th</sup> Congress First Session, *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations* (US Government Printing Office 2007) 4.

120 Council of Europe (CoE), *Secret detentions and unlawful inter-state transfers of detainees in Europe (1<sup>st</sup> report Marty)* (CoE Publishing 2008) 45.

121 The CoE referred to the CIA Rendition Program as 'a spider web of disappearances'. CoE Parliamentary Assembly Ordinary Session, *Official Report of Debates*, (3<sup>rd</sup> PartVol III CoE Publishing 2006) 607.

122 UNCHR, 'Report of the Working Group on enforced or involuntary disappearances' (2005) UN Doc E/CN.4/2005/65, paras 13, 368.

123 Joint Hearing Before the Subcommittee on International Organizations, Human Rights: An Oversight and the Subcommittee on Europe of the Committee on Foreign Affairs House of Representatives 110<sup>th</sup> Congress First Session (n 119) 357.

124 *Maher Arar v John Ashcroft et al*, 532 F3d 157 (2D CIR 30 June 20) paras 192-193.

of national security.<sup>125</sup> Apart from some exceptions,<sup>126</sup> domestic jurisprudence has generally arrived at unsatisfactory judgments for the victims.

The Convention's application in the case of incommunicado detentions and extraordinary renditions is beneficial for the protection of detainees. It has already been alluded, that states tried to limit their human rights obligations by derogating from major international instruments on grounds of public emergency. Such derogations affected mostly the right to liberty and the due process guarantees attached to it. As noted above, they were enforced with laws which permitted prolonged incommunicado detentions and unlawful renditions.<sup>127</sup> At this point, the 2007 Convention may prove to be a useful tool, enhancing the victims' protection. The characterization of the discussed methods as enforced disappearances has at least two obvious advantages. First of all, their complex nature will be acknowledged. It is a more realistic and systematic approach which affirms the danger for the victims since they cannot inform anyone of their current status and seek help. Secondly, under the 2007 Convention the right not to be subjected to enforced disappearance is non-derogable. Article 1(2) of the Convention contains an absolute prohibition on enforced disappearances precluding derogations under any possible justification. Prolonged incommunicado detentions and extraordinary renditions will therefore be utterly outlawed since the Convention leaves no space for a gray area in this field. Although human rights commentators link these two practices to enforced disappearances in general, they haven't examined them under the Convention's framework, although the latter provides a straightforward and sound response to the current international concerns. Hence, it constitutes a valuable underpinning for the individuals' protection.

## 5. CONCLUSION

Enforced disappearances are a widespread phenomenon that involves extreme suffering for the victims, and consequently it has attracted much international attention. Public ignorance alongside conceptual difficulties are just a few of the reasons which delayed the adoption of a legally binding instrument to regulate enforced disappearances. However, the international UN human rights regime reserved a unique approach to enforced disappearances. Indeed, the preference towards creating the UNWGEID over drafting a Convention seemed more reasonable in the 1980s; almost 30 years later, enforced disappearances have generated considerable concern on a global scale, and the international community is finally ready enforce a legally binding instrument.

The adoption of the 2007 Convention is by far the most prominent response to enforced disappearances. The effectiveness and success of the instrument cannot be

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<sup>125</sup> American Courts have dismissed most of these cases, relying upon the 'state secrets privilege'. *El-Masri v Tenet et al*, US 437 F Supp 2d 530, 541 (ED Va 12 May 2006). The case is now pending in the Inter-American Court of Human Rights.

<sup>126</sup> In November 2009, an Italian Court convicted *in absentia* 23 CIA agents for the extraordinary rendition of Abu Omar.

<sup>127</sup> However, after a careful reading of the applicable international law, the validity of these derogations may be challenged. UNCHR, 'Report of the Working Group on Arbitrary Detention' (2005) UN Doc E/CN.4/2005/6, para 76; OAS, 'Report on Terrorism and Human Rights' Special Reports of the IACommHR OEA SerL/V/II.116, Doc 5 rev 1 corr, para 24 (Washington 22 October 2002); UNCHR, 'General Comment No. 29, States of Emergency (Article 4)' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 13(a), (b).

measured, since it has entered into force only a few months ago. Nevertheless, it is fair to say that the Convention is a rather powerful instrument as it provides a comprehensive definition for enforced disappearances and pronounces a right of all peoples not to be subjected to enforced disappearances.

The phenomenon's particularity lies in the authorities' refusal to disclose information on the victims' fate or whereabouts; this refusal renders them essentially helpless. This aspect is well treated by the definition and the Convention as a whole; more specifically, any practice that is mainly characterized by an attempt to efface traces of the victim can be classified as an act of enforced disappearance. This approach signals that methods such as extraordinary renditions and incommunicado detentions can be characterized as enforced disappearances. Therefore, the Convention's scope of application is not confined within the limits of methods that have already emerged. It may also cover new practices that are not yet standardized. Overall, the 2007 Convention signifies considerable progress in the field of international human rights law. This is affirmed through the provided definition, which is flexible enough to respond to present demands and also to adapt to future legal challenges.