

The Committee on Enforced Disappearances

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Introduction

Someone knocks at your door in early morning : plain clothes police forces come to arrest you, without any warrant. They do it openly, they do not hide from your family or the neighbours. You are brought to the police station, beaten or even tortured. Then transferred to another detention facility, preferably unofficial. You are not allowed to contact anyone, neither your family nor your lawyer. You have disappeared, you have been “placed outside the protection of the law”. Since your detention is hidden, your family and your friends are looking for you anywhere they can. But the only answer they get – the only answer they can get-, when asking the police, the army or government officials about your whereabouts, is: “we don’t have her, we don’t know her.” Or: “we know her as a suspected criminal or terrorist”...

This is essentially the “pattern” of enforced disappearance, since it was codified by Marchal Keitel’s Decree “Nacht und Nebel” with the aim of terrorizing and repressing the Nazi’s opponents. After Nazism, this technique of terror was used during colonial conflicts along with torture and summary executions, before being implemented against “subversion” by military dictatorships in Latin America from the beginning of the 70s. From then on it spread onto the other continents: in the Middle-East, with Lebanon, Syria and Iraq... ; in Africa, with Algeria, Libya and Eritrea... ; in Asia, with Sri Lanka, the Philippines, Nepal, North Korea... ; in Europe, with the Former Yugoslavia, Chechnya or Ukraine... This scourge even contaminated some of the oldest Western democracies with the US program of “extraordinary renditions” organized with the complicity or at least acquiescence of a number of European democracies.

Enforced disappearances (ED) have been on the agenda of the international community since 1974, when the phenomenon was “discovered” in Chile. Initially, the problem was to determine the appropriate legal category to qualify this practice, as there was no specific crime or definition in either domestic or international law. Enforced disappearances – the act of forcefully rendering persons “invisible” – suffered from an international invisibility of their own, that only compounded the problem.

Four bodies have played a fundamental role in identifying, framing and bringing the problem to the fore: the Working Group on Enforced Disappearances of the former Commission on Human Rights, the UN Human Rights Committee, and the Interamerican Commission and Court of Human Rights². Those bodies, among other accomplishments, showed that ED could

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² The case law of the European Court of Human Rights was, at the beginning at least, much more limited. It only developed at the beginning of the 90’s, with the Kurdish cases. See Emmanuel Decaux, “La problématique des

be analysed as a complex violation of several human rights: the right not to be arbitrarily detained, the right to recognition as a person before the law, the right not to be subjected to torture or inhuman or degrading treatment, and the right to life. It was thus possible to find a state liable for an enforced disappearance on the basis of general conventions in the field of human rights such as the ICCPR or the Interamerican Convention on Human Rights, by understanding ED as a cluster of rights violations.

This approach, however, was limited. There was something specific about ED which made it difficult to cover all its aspects from within human rights categories, or even with certain crimes, such as “abduction” as defined under most of domestic criminal legislations. The idea thus emerged that specific treaties should be drafted. As early as 1988, the Interamerican Commission of Human Rights tabled a draft convention before the OAS General Assembly. The text was eventually adopted in 1994.³ At the universal level however, it was decided to adopt a more incremental step by step approach, following the method that had previously led to adoption of the Convention against Torture: first a declaration, second a convention. In 1992, the “Declaration for the protection of all persons from enforced or involuntary disappearances was adopted”⁴. On this basis, a new process was started, first through informal meetings, and then within the UN bodies: a draft was tabled by the French expert of the Sub-Commission on Human Rights, Louis Joinet; it was reviewed during two years by the Working Group on the Administration of Justice of the Sub-Commission and then transmitted to the Commission after adoption by the plenary in August 1998⁵. This draft convention was an innovative text, providing for the setting up of a new Committee against enforced disappearances.⁶

During two years, the text was circulated among States for comments⁷. Then, in 2001, France took the initiative to table a draft resolution providing for the creation of an intergovernmental working group in charge of reviewing the draft text and reporting to the Commission. Several States objected for essentially two reasons. Some argued that a text on this topic would be useless, as international law already covered the phenomenon of EDs. They also argued that the Commission should put an end to its standard setting activities and concentrate on implementation. Their case drew on the fact that several recent standard setting processes had lasted for years and represented, in their view, very negative precedents⁸. Other States were

disparitions forcées à la lumière des articles 2 et 3 de la CEDH”, in Catherine-Amélie Chassin (ed.), *La portée de l'article 3 de la Convention européenne des droits de l'homme*, Bruylant, 2006; “La Cour européenne des droits de l'homme et les disparitions forcées”, Mélanges Vincent Berger, Conseil de l'Europe, WLP, 2014.

³ *Interamerican Convention on the Forced Disappearance of Persons*, (A-60), adopted in Belem di Para, Brazil, 9 June 1994, 24th ordinary session of the General Assembly of the OAE. Entered into force on the 28 March 1996. In June 2007, the Convention was ratified by twelve States.

⁴ Resolution 47/133, adopted on the 18 December 1992 by consensus.

⁵ Res. 1998/25 of 26 August 1998.

⁶ See the text in annex of document E/CN.4/Sub.2/1998/19 (report of the Working Group on the administration of Justice of the Sub-Commission). For a comment, see Federico Andreu, « The draft international convention on the protection of all persons from forced disappearance. Impunity, Crimes against humanity and forced disappearance. », *I.C.J. Review*, n°62-63, Geneva, September 2001, and also the contribution of Wilder Tayler in the same issue.

⁷ See Commission's resolution 1999/38 of 26 April 1999 et 2000/37 of 20 April 2000 and doc. E/CN.4/2001/69, with the comments of States and NGOs.

⁸ They referred in particular to the Optional Protocol to the CAT (ten years) and to the *Declaration on the right and responsibility of individuals, groups and organs of the society to promote and protect universally recognized human rights and fundamental freedoms* (thirteen years !). For more details on the negotiation process, refer to Olivier de Frouville, “La Convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées. Les enjeux juridiques d'une négociation exemplaire”, *Droits fondamentaux*, n°6, janvier-décembre 2006, www.droits-fondamentaux.org

not opposed to such a drafting exercise, on the condition that no new supervision body would be created: according to those states, it would have been unreasonable to create a new committee at a time when the whole system was under review, with the prospect, maybe, of the creation of a single committee, in place of the existing ones⁹.

The Commission's resolution which was finally adopted in 2001 was a compromise¹⁰. A *standard-setting working group* was created but it had its first session only two years later, in 2003. In the meantime, an independent expert was appointed with the mandate to "examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance" and to identify gaps "in order to ensure full protection from enforced or involuntary disappearance". The 2002 report of the appointed expert, Professor Manfred Nowak, did cast light on some important gaps, such as the lack of universally agreed definition and the absence of any comprehensive set of obligations designed to prevent EDs¹¹. The same year, the Commission confirmed the creation of the standard-setting working group in its resolution 2002/41 of 23 April 2002. However it decided that the Group would have to elaborate a "draft legally binding normative instrument", not a "convention" as such, so as to comfort the position of States who favoured an optional protocol to the ICCPR or to the CAT. Furthermore, the working group was not to draft its text using the text prepared by the Sub-Commission, but "on the basis of the Declaration on the Protection of All Persons from Enforced Disappearance, in the light of the work of the independent expert and taking into account, inter alia, the draft international convention on the protection of all persons from enforced disappearance (...) transmitted by the Sub-Commission (...)"¹². Some states were indeed of the view that the text of the Sub-Commission was too innovative, and could not serve as a starting point of discussion, thus the idea that it would be one reference among others in the drafting process.

The Working Group in charge of drafting "the legally binding normative instrument" (thereafter "the drafting working group") held five sessions (including one informal session in September 2003) between January 2003 and September 2005. It thus took only two years and a half to draft the Convention, which makes it one of the fastest process held in the United Nations.

This is despite the fact that the diplomatic context was not favourable. At the beginning of the negotiation, it appeared that several factors would make it a hard process: the reluctance of many States to engage in a new standard-setting exercise, as was mentioned earlier; the significance of measures taken in the name of the "war against terror" and the very bad example set by a number of democracies, and in particular by the United States of America, which was at that time involved in the program of "extraordinary renditions." Other factors included the very strong opinion shared by a number of States that enforced disappearances was essentially a Latin-american problem, which belonged to the past. Much persuasion was needed to reverse those trends.

The process was essentially led by France and some important states of the Grulac (the Latin America and Caribbean regional Group), and also some European States like Greece, Spain and Switzerland. But the Europeans were divided on some issues, which gave rise to complications. A number of other States also resisted, although they never expressed a will to

⁹ Those States wanted the new text to be adopted as an optional protocol either to the ICCPR or the Convention against Torture, thus giving jurisdiction either to the Human Rights Committee or to the Committee against Torture.

¹⁰ Res. 2001/46, 23 April 2001, adopted without a vote.

¹¹ See the report of the independent expert, doc. E/CN.4/2002/71.

¹² Paragraph 13 of the resolution.

obstruct the negotiation. Among those were a number of big powers: the United States, Russia and China. From beginning to end, NGOs contributed greatly to the process. The very idea of having international instruments dealing with enforced disappearances had emerged from the activism of associations of families of the disappeared in Latin America. The federation of these associations, called FEDEFAM, initiated the process and was there – together with others, like the AFAD, the Asian Federation – to witness and give its expertise throughout the negotiation. Beside those associations of victims were the principal international human rights NGOs, such as Amnesty International, the International Commission of Jurists, Human Rights Watch, the International Federation of Human Rights (FIDH) or the International Federation of Christians Against Torture (FIACAT).

The working group was chaired by an experienced and skilful French diplomat, late Ambassador Bernard Kessedjian. His politeness and firmness were a central element in order to have the group move rapidly to a final text. Although the Convention was almost lost in the middle of the reforming process of the international system of protection of human rights – with the end of the late Commission on Human Rights, and the creation of a new Council of Human Rights – the text finally went through and, pushed by the active lobbying of NGOs, was adopted by the General Assembly on the 20th of December 2006, in resolution 61/177. It was eventually signed in Paris by the first 49 States, on the 6th of February 2007. A *Coalition against Enforced Disappearances* was created by the NGOs who participated in the process, to promote early entry into force and effective implementation of the Convention. The Convention entered into force on the 23rd of December 2010, after 20 ratifications. The Committee therefore held its first session at the UN Office in Geneva from 9 to 11 November 2011.¹³ On the 1st of January 2016, 95 States have signed the Convention and 51 ratified it.¹⁴

In the framework of this study, we will discuss both the structure (I) and the functions (II) of the Committee on enforced disappearances¹⁵.

I – The structure of the Committee

The new Committee is the result of the negotiation that took place within the Working group in charge of drafting a “draft legally binding normative instrument”. The relevance of its creation was a central issue. Eventually, the discussions led to the creation autonomous Committee.

The debate: Is there a Need for a New Body ?

From the very beginning of the process, one of the most contentious issue was whether or not there was a need for a new committee on enforced disappearances. Most states and NGOs

¹³ See the first annual report of the Committee on Enforced Disappearances, A/67/56 (2012).

¹⁴ See the UN treaty collection for an update : <https://treaties.un.org>

¹⁵ On the substantial part of the Convention, see, in french, Olivier de Frouville, « La Convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées : les enjeux juridiques d’une négociation exemplaire. », *op. cit.* And, in english, Gabriella Citroni, Tullio Scovazzi, *The Struggle against Enforced Disappearances and the 2007 United Nations Convention*, Martinus Nijhoff Publishers, 2007 ; Marthe Lot Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Intersentia, 2012.

were agnostic on this issue, as they said they would favour the most effective mechanism, whatever its form. However, some States took a firm stand from the very beginning against a new Committee. They had two main arguments.

The first one was easily put aside: how would the committee coexist with the existing Working Group of the Commission (and now the Council) on Human Rights dealing with enforced disappearances ? To this, Manfred Nowak answered at the first session that if a new Committee were to come to life, the Working Group would still remain in office for a number of reasons. First, the Group had a universal geographic mandate. As long as the convention was not universally ratified, the Group would thus remain useful. Second, the Group had a humanitarian mandate, aiming in priority at localizing the disappeared persons, while the Committee would have a wider mandate of monitoring, controlling and investigating¹⁶. Nowak also noted that the same question had been raised in relation to torture where two mechanisms coexisted in complementary fashion: the Committee against Torture and the Special Rapporteur against torture.¹⁷ Enforced disappearances are thus one prism to understand the fundamental complementarity of treaty and non-treaty bodies.

The second argument was more significant, as it referred to a quite popular theme among states: the proliferation of supervisory bodies. Switzerland Turkey, Egypt and some others took up the argument at the first session and bluntly opposed the drafting of a new autonomous convention and the creation of a new committee. Instead they proposed the adoption of an optional protocol either to the CAT or, preferably, to the ICCPR. They underlined the fact that ED were violating a series of rights recognized by the Covenant and that the HRC already had a substantial case-law dealing with it. Also a number of states thought that as only a few states had a situation of enforced disappearances, it would be disproportionate to create a dedicated body – in addition to the already existing Working Group. The arguments had some weight as it was put forward in the context of the debate on the overall reform of the system of the treaty bodies and professed need to streamline procedures. All states agreed on the fact that there were too many treaty bodies (seven at that time), implying increasingly heavy reporting obligations for State parties. Different solutions were at the time contemplated, the most ambitious being the setting up a of single generalist committee, which would have replaced the seven specific bodies. This idea was used to oppose the creation of a new Committee, essentially implying that all new projects should be put on hold until the reform. Even more restrictive (but also quite isolated) China proposed that the supervision task should be delegated to the assembly of the States parties.

This debate posed a serious risk to the whole negotiation. It could have derailed the focus on substantive issues, and much time could have been spent repeating the same arguments without moving forward. This is why the Chair Bernard Kessedjian – using his authority – proposed a precise agenda for the drafting working group, according to which substantial issues would be discussed first and then, in second, procedural matters. The latter themselves would be divided into two items : the functions would be contemplated first, and the nature of

¹⁶ E/CN.4/2003/71, § 32. See also E/CN.4/2004/59, §§ 161-163 and E/CN.4/2005/66, §§ 149-150.

¹⁷ Now a third body exists in the field of the prevention of torture, with the Sub-Committee against torture. And the same overlapping can be observed about discrimination against women with the CEDAW and the Human Rights Council's working group or with the CERD and the Special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Working Group on people of African descent and the special rapporteur on minority; or with the CRPD and the Special rapporteur on the rights of persons with disabilities etc. Rather than the exception, this approach of duplicating a treaty body with a special procedure is in fact becoming the rule.

the body only in the second place. Indeed, it seemed that the nature of the body was inherently linked to the functions it would undertake.

Consequently, no final decision was taken on the nature of the supervision body until the last session. Several things happened between the first and the last session that made it possible to come to an agreement about the final text.

First, Bernard Kessedjian managed to organize several limited debates where the matter could be discussed thoroughly. Arguments in favour of a new Committee progressively emerged and gained support among a growing number of delegations. Conversely, arguments against the new Committee appeared weak and non decisive. Alternative proposals were made, such as the setting up of a “sub-committee” of the HRC (an idea promoted by Switzerland). Second, the debate on the setup required to effectively combat disappearances led to the conclusion that it would be difficult for an existing committee to undertake those new functions. There were practical problems: obviously, the HRC was already overburdened and facing serious difficulties in achieving its own limited mandate. If it had to undertake new functions, the number of experts within the Committee should be increased. That would create legal problems, as any modification of the structure of the Committee could only be decided through an amendment of the Covenant, which implied going through a very complicated process. Furthermore, a study of the Secretariat compared the costs of creating a new body and enlarging the composition of the Committee (or creating a sub-committee composed of additional members), and it appeared that there was no substantial advantage in the second solution.

At the last session, Bernard Kessedjian presented a “package” of substantial and procedural provisions and clearly took a stand in favour of a new Committee as the most “realistic” solution. But the package also included some compromise provisions, to take into account the objections of the countries who insisted on the need to wait for the outcome of the reform process. The package was accepted by all delegations, although a few of them expressed reservations in their statements made at the end of the session. The Convention as it has been adopted, therefore, sets up an autonomous Committee against enforced disappearances.

An autonomous Committee

In the end, the negotiation therefore led to the setting up of a committee of independent experts, similar to other autonomous committees that are part of the wider UN system of treaty bodies. To reach that result, however, compromises had to be made that created certain constraints on the committee. A sunset clause was included (article 27), so as to revisit the issue of the need for an autonomous committee at a later stage. The Committee is also instructed under article 28 to cooperate closely with other relevant mechanisms. Equally, it is interesting to note that states have limited the *ratione temporis* competence of the Committee under article 35 to “enforced disappearances which commenced after the entry into force of the Convention.”

A Committee of independent experts

Article 26(1) of the Convention provides that “[t]he Committee shall consist of ten experts ». The number of ten experts may at first sight appear low, compared to the eighteen experts of the HRC, the CESR, the CRC or the CERD or the 23 experts of the CEDAW. In fact, it is a very good compromise if one looks at the first proposals tabled in the working group,

mentioning only 5 experts (like the WGEID), and if one contemplates the fact that the Committee, although in charge of multiple functions, only deals with one precise phenomenon – compared to the multiplicity of issues that the HRC or the CODESOC have to deal with. In comparison, the CAT, also a phenomenon-specific body, is also composed of 10 experts and does not seem understaffed.

The members of the Committee are elected for a four years term and are eligible for re-election only once (art. 26(4)). This term is now standard for the treaty bodies. Still, it is a short term for a body with quasi-judicial functions¹⁸. The limitation on the number of successive mandates, however, is an innovation, shared with the contemporaneous CRPD: in all the other committees, re-election is possible upon re-nomination. It seems that those two new texts reached a balance on this issue since a member can totalize eight years of mandate in a row, allowing a certain continuity of membership and at the same time a regular renewal of the composition of the Committee.

The first elections were held during the first meeting of the State parties on the 31st of May 2011. Ten members were elected by secret ballot, among them five were chosen by lot to serve for a duration of two years only, in accordance with article 26(4) of the Convention. Members are to be elected according to equitable geographical distribution with “due account” to relevant legal experience and balanced gender representation. In 2011, the geographical criteria was more or less respected, with 2 members from the Asian Group (Iraq and Japan), 2 members from the African Group (Senegal and Zambia), 1 member from the Eastern European Group (Albania), 2 members from the Latin American and Caribbean Group-GRULAC (Argentina and Uruguay), and 3 members from the WEOG (France, Germany and Spain). On the other hand, “gender balance” was hardly implemented with only one woman among nine men. The two following elections brought more balance in terms of gender, with two women but also a certain geographical imbalance with 4 experts from the GRULAC (Argentina, Colombia, Mexico and Peru) and none for the African Group. The French expert, professor Emmanuel Decaux, was elected as a chair of the Committee at its first session. He was re-elected Chair in 2013 and 2015. Decaux’s leadership during the first years of the Committee has clearly been a major factor of its success.

Like other comparable bodies, the Committee on enforced disappearances has the right to establish its own rules of procedure (art. 26 (6)), and is to be provided by the Secretary general “with the necessary means, staff and facilities for the effective performance of its functions”(art. 26 (7)). The Committee adopted its own rules of procedure at its first and second sessions, drawing from the innovations of the Convention and from the experience of other Committees.¹⁹ Again and similarly to the other committees it is supported by the UN Office of the High Commissioner for Human Rights based in Geneva.

Article 26(1) provides that the experts “shall serve in their personal capacity and be independent and impartial.” The Rules of procedure expand this general statement. Article 10-2 of the Rules gives a definition of independence by stating that it “requires that they serve in their personal capacity and shall neither seek nor accept instructions from anyone concerning the performance of their duties. Members are accountable only to the Committee and their own conscience.” Furthermore Rule 47 is specifically dedicated to the issue of “conflict of interest”, setting up the principle, among others, that a member shall not be present or

¹⁸ Compare to the terms of the judges of international courts : nine years, for instance, for the judges of the ICJ or the ICC ; six years for the judges of the ECHR. At the same time, judges of the ATUN and of the ATILO are elected for three years ; members of appellate body of the DSU at the WTO are elected for 4 years.

¹⁹ Doc. CED/C/1, 22 June 2012.

participate in the activities of the Committee on a case or situation for which he may find himself in a conflict of interest. In addition, the Committee has adopted the so-called “Addis Ababa guidelines” on the independence and impartiality of members of the human rights treaty bodies endorsed by the 24th Annual Meeting of Chairpersons of Human Rights Treaty Bodies in June 2012.²⁰

The independence of the Committee also results from the public character of its activities, except the complaint procedures, which require confidentiality to protect the interests of the parties. Several attempts were made, during the negotiations, to limit this publicity and to keep confidential most of the work of the committee²¹. States may well be wary of enforced disappearances being exposed a practice that occurs within their jurisdiction. Nonetheless, all provisions to that end were removed. Article 36 states that the Committee shall submit an annual report to the GA.²² The Rules of procedure strengthen the public dimension of the Committee’s work. Rule 27 states that the meetings of the Committee and its subsidiary bodies shall be held in public unless otherwise stated in other provisions or when the Committee decides to meet in private. In a more innovative way, Rule 55 provides for the possibility for the Committee to organize “Days of general discussion on the Convention” “in order to enhance a deeper understanding of the content and implications of the Convention”, throughout a debate with all concerned stakeholders.²³ Similarly, Rule 56 on the drafting of general comments on the convention allows the Committee to circulate its drafts to all stakeholders in order to get their comments. Although it did not adopt any general comment yet, it followed an open process of consultation when drafting its “guidelines”²⁴, but also its “statement on enforced disappearance and military jurisdiction”.²⁵

The sunset clause and the need for cooperation

Bernard Kessedjian’s “package” implied some concessions for States who opposed the creation of the new Committee. The most visible one is probably the sunset clause of article 27, which makes the Committee a precarious institution :

²⁰ See Decision adopted by the Committee during its 3rd session, 7 November 2012, annexed to the second annual report of the Committee, A/68/56 (2013), p. 32.

²¹ See in particular E/CN.4/2005/66, §§ 144-146. Bernard Kessedjian proposed confidentiality for urgent actions, complaint procedures and on site investigations, provided that this confidentiality could be lifted in case the State would refuse to cooperate – a system inspired from the European Convention on the Prevention of Torture. This proposal was opposed by all NGOs and some States as a grave retrogression in comparison with the public nature of the procedures set up by other conventions. Confidentiality was acceptable for the complaint procedures only during the contradictory phase, but should not be applicable to the « views » adopted by the Committee.

²² See also Rule 42 of the Rules of procedure.

²³ In practice, the Committee has held discussions with various stakeholders in different formats: see in particular the first report A/67/56, §§ 18-20, the second report A/68/56, §§ 12-16 and the third report A/68/56, §§ 14-16 on “thematic discussions” held in private or public sessions...

²⁴ When drafting its guidelines on the relations with NGOs, the Committee made the drafts available on its website for comments. It also closely consulted with the International Coordinating Committee of National Human Rights Institutions when drafting its guidelines on the relations with NHRIs. See third report A/69/56, § 30 and 32.

²⁵ Adopted by the CED on its eighth session, 13 February 2015. Annex III of the fourth annual report A/70/56 (2015). See also the third annual report, A/69/56 (2014), §§ 14-16: the Committee held a private meeting during its fifth session and a public thematic discussion on enforced disappearance and military justice.

“A Conference of the States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body — without excluding any possibility — the monitoring of this Convention (...).”

The Chair of the drafting working group introduced this wording as “a third option which would fit in with the proposal by the United Nations High Commissioner for Human Rights to study the possibility of merging all the treaty-monitoring bodies into one.”²⁶ This proposal was considered acceptable by all delegations. It addressed the main concern of the opponents to a new committee, i.e. not anticipating on or even preempting the future reforms of the treaty bodies or risk adversely affecting them. At the same time, delegations who favoured the creation of the committee had the satisfaction to see it come to life, even for a limited period of time, with the hope that, once in place, it would be difficult to remove it, or only in the context of a reform which would replace all the treaty bodies by a single Committee. Six years after the entry into force of the Convention, this hope seems to have been fulfilled and voices calling for terminating the Committee are hardly heard. In a conference held in Geneva on the occasion of the 10th anniversary of the Convention, the chair of the Committee, professor Emmanuel Decaux has described the meeting to be held by states parties under article 27 as a “technical stage”.²⁷ At the time of writing these lines (April 2016), the meeting is still to be held but it is highly predictable that the Committee will be confirmed as the legitimate monitoring body of the Convention – at least until an overall reform of the system of the treaty bodies takes place, which still belongs to the realm of speculation.

The second provision which was included as a compromise was required, in its principle, by Switzerland and formulated by the Chair. Article 28 is supposed to ensure that the Committee would not duplicate other existing bodies whether Charter (e.g.: the WGEID), or treaty (e.g.: the HRC or the CAT) based:

1. In the framework of the competencies granted by this Convention, the Committee shall cooperate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations and with the relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices working towards the protection of all persons against enforced disappearances.
2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.

Thus the Committee has a legal duty both to cooperate with a wide variety of institutions and to consult “other treaty bodies”, with a special mention for the HRC, as the body which has

²⁶ E/CN.4/2006/57, § 70.

²⁷ <http://www.ohchr.org/Documents/HRBodies/CED/10thAnniversary/EmmanuelDecaux.pdf>

See also his closing speech at the 9th session of the Committee, which pleads convincingly in favour of the confirmation of the Committee: “Il n’y a pas de “plan B”. Un tel pari n’aurait aucun sens, ce serait perdre tous les acquis obtenus depuis 4 ans, ce serait revenir 30 ans en arrière...”

http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_OCR_9_23889_F.pdf

already developed a case law on ED on the basis of the Covenant.²⁸ Rule 45 of the Rules of procedure confirms that duty of cooperation, not only with the HRC, but also with the CAT and the Sub-Committee under the OPCAT “with a view to ensuring the consistency or their respective observations and recommendations.” The WGEID is also mentioned in a separate paragraph as another privileged partner.

In practice, the CED has rapidly implemented those provisions through multilateral or bilateral meetings. The chair has regularly participated in the annual meeting of the chairs of treaty bodies.²⁹ In March 2012, during its second session, it held a general public meeting with a whole range of UN bodies, including the WGEID.³⁰ In November of the same year, during its third session, the Committee also held a meeting with Sir Nigel Rodley, member of the Human Rights Committee, who shared the jurisprudence and experience of the HRC in the field of enforced disappearances.³¹ In 2014, the Committee met other actors, including the Committee on the right of the child and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, as well as with the Voluntary Fund for Victims of torture...³² The cooperation with the WGEID has been ongoing since the very first year of the Committee.³³ An annual meeting is scheduled and measures have taken so that the sessions of the two bodies overlap at least once a year to facilitate exchanges and joint events. Consultations cover both substantial³⁴ and procedural issues.³⁵

Cooperation with other important stakeholders was also rapidly formalized in two important documents: a document on the relationship between the CED and civil society actors, adopted at its fifth session;³⁶ and a document on the relationship between the CED and National Human Rights Institutions, adopted at its seventh session.³⁷

*Limitation with regard to the *ratione temporis* competence*

During the negotiation, some States also insisted that the Committee should have a limited *ratione temporis* jurisdiction. They clearly did not want the Committee to handle past cases of ED. This resulted in article 35 which states that :

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.

²⁸ See also to this regard Rule 44 and 45 of the Rules of procedure. Rule 45(2) specifies that the Committee “shall also regularly coordinate and exchange relevant information with the Working Group on Enforced or Involuntary Disappearances”.

²⁹ The chair of the CED was elected as the chair of the 27th meeting held in San José, Costa Rica in June 2015. See A/70/302, § 8.

³⁰ See first report of the Committee, A/67/56 (2012), § 39.

³¹ *Ibid.*, § 21.

³² Fourth annual report of the Committee, A/70/56, §§ 33-36.

³³ The first meeting was held during the first session of the Committee in November 2011: see the first annual report A/67/56, §§ 25-26, during which it was decided that the two bodies will hold an annual meeting.

³⁴ In 2013, the two bodies identified issues of common interest, i.e. military tribunals, enforced disappearance in armed conflict and the difference between missing persons and victims of enforced disappearance. Third annual report of the Committee, A/69/56, § 26. Also, the same, year, three members of the Committee participated in the thematic discussion on enforced disappearance and economic, social and cultural rights held by the WGEID in preparation of its thematic study on the issue: *Id.*, § 27.

³⁵ See the second report A/68/56, § 19: the Committee and the WGEID “a way to process the requests for urgent actions submitted, on behalf of victims of enforced disappearances, in parallel to both bodies”.

³⁶ CED/C/3.

³⁷ CED/C/6.

2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

Was this provision really necessary? Article 28 of the VCLT already stipulates clearly that the provision of a treaty “does not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.” However, it should also be recognized that the situation of EDs is quite specific. EDs have been analyzed as a continuous act up to the moment when the case is “clarified”, i.e. until the disappeared person, or his/her body has been found³⁸. It was quite clear that some States wanted to have an explicit *ratione temporis* clause in the treaty and if they had not succeeded in having it, they would have made a reservation on this aspect. The limited *ratione temporis* jurisdiction could thus be seen as a measure to entice states to ratify the Convention who otherwise might have hesitated in doing so, even though it may limit the reach of the Committee and its ability to investigate past abuses.

In practice, the Committee was rapidly confronted with the issue when it reviewed the reports of Uruguay (April 2013)³⁹, Spain (November 2013)⁴⁰, but also of Germany (March 2014).⁴¹ In order to clarify its position on the matter for the future, the Committee decided to adopt a “statement on the *ratione temporis* element in the review of reports by State parties” under the CED, on the 15th November 2013 during its fifth session.⁴² In the statement, the Committee clearly distinguishes between the individual complaint procedure and the procedure for the review of reports by states parties. If it is precluded from examining individual cases of disappearances that commenced before the entry into force of the Convention for the State concerned, it remains open for the Committee to question states on present compliance with their obligations under the Convention, even in relation to past disappearances:

2. Article 29 deals with the “obligations under this Convention”, in the light of the “international law in force for this State party” and requests that the reporting process take into consideration the full range of its obligations today;
3. If information related to the past is useful during the reporting process as a means to understand fully the challenges of the present, the Committee ought to direct its attention in its concluding observations to the current obligations of the State concerned;

³⁸ This continuous nature is also the basis for derogation to statute of limitations : see art. 8 (1) of the Convention. See also the WGEID’s General Comment on enforced disappearance as a continuing crime, in *Compilation of WGEID’s General Comments*, p. 23. See also InterAmerican Court for HR, *Radilla-Pacheco v. Mexico*, 23 November 2000, § 239-241.

³⁹ CED/C/URY/CO/1, in part. §§ 12-13 on enforced disappearances that occurred the time of the military dictatorship.

⁴⁰ CED/C/ESP/CO/1, in part. §§ 31-32 about enforced disappearances committed during the Franco era. See also the Chair’s concluding remarks during the dialogue: “... it was necessary to distinguish between, on the one hand the obligations of the State party and the competence of the Committee in respect of particular matters, and on the other the need for the Committee to develop an overview of the situation in a particular country.” CED/C/SR.63, § 26.

⁴¹ CED/C/DEU/CO/1, in part. §§ 24-25 in relation to reparation for past atrocities including by the Nazi regime. See also §§ 12-13 about the complicity in extraordinary renditions.

⁴² Included in Annex V of its third annual report, A/69/56, p. 31.

II – The functions of the Committee

The Committee fulfils the usual functions of a treaty body, but some improvements have to be noted in comparison to other treaties. In addition, a number of functions have been added, to take into account the specificities of ED.

“Ordinary but improved” functions

The relevant traditional functions of treaty bodies are: the reviewing of states parties’ reports, deciding upon complaints – both individual and interstate – and undertaking inquiries.

State party reports (art. 29)

This provision tries to draw lessons learnt from the practice of pre-existing treaty bodies. States are bound to submit to the Committee “a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.” The Committee, like the HRC and others, “shall issue such comments, observations or recommendations as it may deem appropriate », to which the State party “may respond (...) on its own initiative or at the request of the Committee.” But the provision also breaks with the practice of “periodic reports”: states have no obligation to submit periodic reports within two years, as in the CERD, or four years for the CEDAW. Rather, according to paragraph 4 of article 29, “[t]he Committee may also request States Parties to provide additional information on the implementation of this Convention.”

The idea of the drafters was to lighten the reporting obligations of states and also to stick to the new practice of treaty bodies of following-up on the most specific and pressing issues. In fact, the Committee has devised a two-tier procedure, adopting the practice of follow-up of other committees, including the HRC, and also using article 29§4 on a systematic basis so as to create a follow-up on a periodic basis – thus creating a hybrid between the procedure of periodic reports and the procedure of “list of issues prior to reporting” adopted by the HRC.⁴³ On the one hand, Rule 54 provides for a follow-up procedure under which the Committee may indicate “whether ... it appears that some of [the state’s party] obligations under the Convention have not been discharged or that sufficient information have not been provided and, therefore, request the State party to provide the Committee with follow-up information to concluding observations by a specified date.” One or two rapporteurs on follow-up are to be designated to assess the information submitted by the state party. Practically, the Committee has by and large followed the HRC’s methods of work.⁴⁴ Three recommendations are selected for the follow-up and the state is instructed in a paragraph of the concluding observations to provide “relevant information” within one year; once a year, the rapporteurs present a report to the Committee with their assessment, based on the state party’s response and on information submitted by other sources. The Committee thus “grades” the responses of the

⁴³ See CCPR/C/99/4, 29 September 2010.

⁴⁴ See CCPR/C/108/2, 21 October 2012.

state party to determine whether it has complied, and to what extent, with the recommendation selected in the concluding observations.⁴⁵

On the other hand, the Committee relies on article 29§4 to systematically request from the states parties “additional information” on the implementation of all its recommendations included in the concluding observations within a specific deadline, which is generally 6 years⁴⁶, but can be shortened to 3 years for the most serious situations.⁴⁷

In its Rules of procedure, the Committee also provided for a three steps approach to non cooperative states parties who fail to submit reports and additional information: first a reminder sent to the state concerned⁴⁸; second, a reference of the state’s failure in the Committee’s annual report; third, the review of the state’s party steps to implement the convention in the absence of a report.⁴⁹ Similarly, the Committee also adopted the possibility of reviewing the report of a state party without the presence of the delegation, when the state fails to respond to an invitation to have representatives attending the meeting.⁵⁰

Another interesting feature of the Rules is to provide officially for “alternative reports” to the state report. Rule 52 thus gives a formal existence to the essential contribution of NGOs and other civil society organizations in the process of reviewing the reports. All those contributions are put on the website, and are publicly accessible. Informal and private meetings are also held between members of the Committee and NGO representatives in parallel to the session.

Complaints

Complaints were not included in the first draft presented by Bernard Kessedjian. The Chair of the drafting working group was clearly focusing his attention on reports and urgent action and was not convinced of the usefulness of complaint procedures which, in his view, could only be optional – and thus probably not accepted by States parties (or at least not accepted by those states where disappearances were taking place). Nevertheless NGOs and some States insisted that provisions on individual and interstate procedures be included, as it appeared to be one a central feature in other comparable conventions. Other States firmly opposed, arguing that such procedures already existed in the ICCPR. The principle of an individual complaint procedure was accepted at the third session (October 2004) and a concrete proposal was made by the Chair at the fourth session (January-February 2005). But the interstate complaint procedure was only inserted in the text at the last session, after repeated proposals by an NGO and Canada, who underlined the fact that these procedures, although never used at the universal level, had already been triggered at the regional level (before the ECHR) and in any case could represent a factor of deterrence for potential violators⁵¹. Both individual

⁴⁵ See Fourth annual report of the Committee, A/70/56, § 44; Report on follow-up to concluding observations of the Committee on Enforced Disappearances (7th session, 15-26 September 2014), CED/C/7/2.

⁴⁶ See COBs on France, the Netherlands, Spain, Uruguay...

⁴⁷ See COBs on Iraq, CED/C/IRQ/CO/1, § 43.

⁴⁸ See fourth annual report, A/70/56 (2015), §§ 48-49 for the list of reminders and the states that submitted their reports as a result.

⁴⁹ Rule 50 of the Rules of procedure.

⁵⁰ Rule 51 of the Rules of procedure.

⁵¹ See E/CN.4/2006/57, § 64.

and interstate procedures are now optional and states need to make special declarations for the Committee to have jurisdiction.⁵²

The individual complaint procedure (article 31) is quite similar to other comparable procedures. One distinct feature, however, is the mention in the text of the Committee's power to request a State party to take interim measures.⁵³ Existing committees (HRC, CAT, CERD) had attributed themselves this power in their respective rules of procedures.⁵⁴ The power is here explicitly conferred to the Committee.⁵⁵ It thus confirms the practice of the existing treaty bodies in this regard. More generally, it is a way to recognize the increasing importance of this procedural instrument in the practice of international tribunals. One can see how it might be particularly useful in the case of EDs, where a "race against time" is often involved and urgent measures may be necessary to locate the disappeared, while guarding the state against further action that might compromise that person's rights.

Like other fellow Committees, the CED has set up in its Rules of procedure a follow-up procedure on views adopted on individual cases: within six months, the State party concerned has to submit a written response detailing the actions taken to implement the recommendations.⁵⁶

The Committee adopted its first "views" in a case against Argentina during its 10th session in March 2016.⁵⁷

The interstate procedure (article 32) is more unusual. Other interstate procedures before UN treaty bodies⁵⁸ have more to do with conciliation than with a quasi-judicial procedure. The States concerned are supposed to try to solve the problem themselves and only if they failed to do so will a Committee (for instance the HRC) "make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant." The result of the procedure is a simple mention of the facts and of the solution reached in the report of the committee. Article 32 of the Convention is clearly more open:

A State Party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention.

The brief language of article 32 gives way to a more judicial procedure. It is still uncertain however what the CED will make out of it. Until then, the Rules of procedure seem to have

⁵² On the 1st of May 2016, 19 states have made declarations for both article 31 and 32: Albania, Argentina, Austria, Belgium, Bosnia and Herzegovina, Chile, Ecuador, France, Germany, Lithuania, Mali, Montenegro, the Netherlands, Portugal, Serbia, Slovakia, Spain, Ukraine, Uruguay. Japan has made a declaration only with regard to article 32.

⁵³ See article 31§4 and Rule 70 of the Rules of procedure.

⁵⁴ See for instance Rule 92 of the HRC's Rules of procedure.

⁵⁵ See also article 6 of the Optional Protocol on communications to the CRC and article 5 of the Optional Protocol to the ICESCR.

⁵⁶ See Rule 79 of the Rules of procedure.

⁵⁷ See CED/C/10/D/1/2013 and the press release:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18494&LangID=E>

See also the fourth annual report of the Committee, A/70/56, § 71.

⁵⁸ See article 22 of ICERD; articles 41 to 43 of the ICCPR ; article 21 of CAT ; article 74 of CMW ; article 10 of the Optional Protocol to the ICESCR; article 12 of the Optional Protocol on communications to the CRC.

adopted a “classical” approach to the interstate procedure⁵⁹, but nothing prevents the Committee, in the future, to adopt another interpretation.

Inquiries (art. 33)

The procedure of inquiry was less ordinary than the two others at the time of its adoption, as it could only be found in the CAT. Since then, such procedures have been included in all subsequent protocols.⁶⁰ In the CED, however, the triggering of the procedure is not conditioned on reports of “systematic” practice of ED as required in the CAT and in the optional protocols subsequently adopted ; systematic or “gross” violations are dealt with in the following article concerning ED amounting to crimes against humanity (see below). Here, the procedure can be initiated “[i]f the Committee receives reliable information indicating that a State Party is *seriously* violating the provisions of this Convention”. In such a situation, it may “after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.”⁶¹ The text does not state where exactly the visit should take place. A proposal to specify that the visit should take place only in the state’s territory was rejected and another proposal to state that it could take place into “any territory under the state’s jurisdiction” was first adopted and then abandoned. But Rule 93§1 restates the territorial conditions, taken from article 20 of the CAT.

The Committee has to notify in writing its intention to make a visit, and the State must respond “within a reasonable time ». Consent to the visit is undoubtedly required as paragraph 4 stipulates : “If the State Party *agrees* to the visit...”⁶² Still, the language of article 33 makes the refusal of a visit the exception rather than the rule. Paragraph 3 indicates that “Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.” This suggests that the State has to give reasonable grounds to refuse a visit. And certainly, it is for the Committee to evaluate the reasonableness of these grounds. At the same time, it is obvious that a visit on a State’s territory or on a territory under the jurisdiction of the State can practically never happen without the consent and authorization of that same State. But the text gives more weight to the Committee when negotiating the possibility of a visit with a State than article 20 of the CAT does. It takes up the idea previously developed in the practice of the UN special procedures that the actual course of a visit should be negotiated carefully, so that all the guarantees of independence and seriousness of the inquiry are respected: “the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.”⁶³ The Rules of procedure adds to this the interesting possibility for the Committee holding hearings.⁶⁴

The outcome of the process is that the Committee communicates “to the State Party concerned its observations and recommendations”. The draft provision which stipulated that this procedure was entirely confidential was deleted in the final version. One can therefore

⁵⁹ See Rules 81 to 87 of the Rules of procedure.

⁶⁰ That is articles 8 and 9 of the Optional Protocol to CEDAW, articles 6 and 7 of the Optional Protocol to the CRPD, articles 11 and 12 to the Optional Protocol to ICESCR and article 13 of the Optional Protocol on communications to the CRC.

⁶¹ § 1.

⁶² See also Rule 93§2 and Rule 94§§ 1 and 2 of the Rules of procedure.

⁶³ See also Rules 94 and 96 of the Rules of procedure.

⁶⁴ See Rule 95 of the Rules of procedure.

consider that those “observations and recommendations” can be published in the annual report of the Committee and thus made public, without the authorization of the State, as is the case in article 20 of the CAT. Moreover, the CAT’s article 20 procedure can be opted out by States parties pursuant to a simple declaration made in accordance with article 28. The same goes with inquiries procedures under the optional protocols of the CRPD and of the CRC. This is not the case for article 33 of the CED.

At the time of writing these lines, the Committee has received several requests for opening an article 33 inquiry, the most followed-up being on Mexico, the CED having triggered the formal procedure for a visit at its 10th session.⁶⁵ Still, no visit has been conducted yet.

New mechanisms

These original functions are urgent action and reporting in the case of ED amounting to a crime against humanity.

Early warning and urgent action (art. 30)

The experience of the UN Working Group on Enforced Disappearances has shown that urgent action is key to tackle enforced disappearances and save lives. This experience is shared by NGOs which have also developed early warning and urgent action procedures. This result is probably related to the fact that, very often, unfortunately, disappeared persons are summarily executed after a few days of secret detention. EDs are, in those cases, hidden murders. Urgent action can sometimes stop this process and make the person reappear, so that it recovers the “protection of the law” that disappearance had made him or her lose. This point was very clearly understood by the Chair of the drafting working group and by some other governmental delegations, and thus the negotiation very rapidly focussed on this issue.

Reluctant states acted as if they did not understand clearly the difference between this urgent procedure and the individual complaint procedure. Their argument was to insist for the inclusion of admissibility conditions. By nature, an “urgent” procedure has to be swiftly implemented, with the consequence that only very “light” conditions of admissibility can be imposed. Article 30 ends up stating five conditions of admissibility.⁶⁶ Amendments proposing to include a condition of exhaustion of domestic remedies were dismissed.

Urgent actions can be initiated by a large number of persons, which is a condition of efficiency given the evident inability of the persons “disappeared” to trigger such a mechanism themselves. Those persons who have a “legitimate” interest are the same who have the right to introduce a *habeas corpus* before the national tribunals (art. 17 (2) f)), who can have access to some information on the person detained (art. 18 (1)) and/or who can

⁶⁵ See third annual report of the Committee, A/69/56 (2014), §§ 68-72. See also fourth annual report, A/70/56 (2015), §§ 48-50 and 72-74.

⁶⁶ Conditions are that the request a) is not manifestly unfounded; b) does not constitute an abuse of the right of submission of such requests; c) has already been duly presented to the competent bodies of the state party concerned, such as those authorized to undertake investigations, where such a possibility exists; d) is not incompatible with the provisions of this Convention; and e) the same matter is not being examined under another procedure of international investigation or settlement of the same nature.” Compare with the WGEID’s revise methods of work, A/HRC/WGEID/102/2, 7 February 2014, § 14.

introduce an *habeas data* before a tribunal in order to obtain that information when the authorities refuse to provide it (art. 20).

When those conditions are met, the Committee “shall request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee”. What happens if the State does not respect the time limit or does not respond at all? In all those kind of procedures, the bodies’ powers are double: blaming and reporting. If the State provides information, the Committee can take a wide range of measures. Paragraph 3 is particularly strongly-worded if we compare it with other comparable procedures, in that the Committee “may transmit recommendations to the State Party, including a request that the State Party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this Convention.” The State party also has “to inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation”. In return, the Committee will inform the author of the communication. Paragraph 4 specifies that the Committee “shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.” There is thus a contradictory exchange of information until the case is “clarified” and the Committee acts as a “channel of communication” between the state and the authors, as the WGEID does under its own communication procedure.

According to the “jurisprudence” of the Working Group on Enforced disappearances, a case is said to be “clarified” when the whereabouts of the disappeared persons are clearly established (...) irrespective of whether the person is alive or dead.”⁶⁷ Based on this criterion, states cannot pretend that cases have been “clarified” on the sole basis of, for instance, compensation provided to the families, or a judicial declaration of death unilaterally issued by the authorities without the clear consent of the families.⁶⁸ It is to be hoped that the CED will consistently apply the same criteria.

In its first year of functioning, the Committee sent five urgent actions concerning Mexico, but the number of requests quickly increased. As indicated in a document published by the Committee on its website⁶⁹, from March 2012 till April 2016, the Committee has sent requests to urgently locate and protect 294 persons in five states parties, namely Brazil, Colombia, Iraq, Mexico and Morocco. An immense majority of the cases concern Mexico. In each case, the Committee has sent specific requests that the state would take a number of measures and asked the state to report back within 10 to 15 days. Among the 294 cases sent, only five cases have been “clarified” as the disappeared were either located alive (three cases in Iraq) or dead (two cases respectively in Mexico and Colombia).

Action in case of crimes against humanity (art. 34)

This is the other new feature of the Convention. The idea came from the Chair Bernard Kessedjian himself. At first, he made a proposal that in case of ED amounting to crimes

⁶⁷ UN WGEID’s Revised Methods of Work, *op. cit.* ft 61, § 26.

⁶⁸ More on the WGEID’s Methods of Work, see Olivier de Frouville, “Working out a Working Group: a view from a former Working Group member”, in Aoife Nolan, Therese Murphy, Rosa Freedman, ... Brill, 2016 (to be published).

⁶⁹ Consulted on 28th April 2016.

against humanity – according to the Convention’s definition in article 5 – the Committee would have the competence to bring the matter before the UN Secretary General, in order for him to take whatever measures he could adopt within the scope of his powers. Many States were reluctant: some because they opposed all measures of control; others because they doubted that such a procedure was “constitutional” in the UN Charter’s framework. However, it was pointed out that this sort of arrangement was not entirely new. For example, article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide and article VIII of the International Convention on the Suppression and Punishment of the Crime of Apartheid already make it possible to bring matters before some of the UN’s political bodies. Finally, a compromise was that the Committee would “bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations.” Before, the Committee should try to seek from the state party “all relevant information.”⁷⁰

What will the General Assembly do once it has been seized by the Committee? Bringing the matter to the Secretary General was an implicit reference to article 99 of the Charter, which allows him or her to refer a situation to the Security Council. And according to article 16 of the Rome Statute, the Security Council himself has the power to refer a situation to the International Criminal Court... The final version of the text rather relies on the General Assembly which, according to article 10 and 11 of the UN Charter may either formulate recommendations directly to the State(s) concerned or decide to refer the situation to the Security Council.

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In sum, the CED is certainly a “new generation” committee. As the heir to older committees, it benefits from their past experience and various attempts to enlarge their mandates and powers (interim measures is a striking example). But as a new committee, it also appears innovative, and indeed some of its features have been taken up in subsequent instruments adopted, that is mainly the optional protocols to the CRPD, CRC, ICESCR and CEDAW. Although many states doubted that there was any justification to create a new committee only dedicated to the issue of enforced disappearances, the first years of the Committee have proved them wrong. This is due to the mobilization of civil society and families of the disappeared, particularly in some key states parties like Mexico, who understood well not only the complementarity between the Committee and other competent mechanisms, like the WGEID and the HRC, but also its added value. This is also greatly due to the dedication and dynamism of the members of the Committee, led by the first chair Professor Decaux, who all tirelessly worked so that within a few years, the Committee would be ready to act effectively in order to eliminate enforced disappearances and assist victims in their legitimate quest for truth, justice and reparation.

⁷⁰ See E/CN.4/2006/57, §§ 60-63.