CRDH PARIS HUMAN RIGHTS CENTER
UNIVERSITÉ PARIS II PANTHÉON-ASSAS

Human Rights Speaker Series
Human Rights Center
Essex University
5 February 2021

**"Are 'enforced disappearances' disappearing from the multilateral agenda?'**

Olivier de Frouville*

*Abstract*

*From the late 1970s and early 1980s to the mid-2000s, international and regional attention* increased on the phenomenon of enforced disappearances. *This development resulted, among others, in the integration of enforced disappearance as a crime against humanity in the Rome Statute at the International Criminal Court and ultimately, in the adoption of the International Convention for the Protection of All Persons Against Enforced Disappearances of 20 December 2006. Since the entry into force of the Convention, on 23 December 2010, we are faced with a paradox: never has the notion of enforced disappearance been so well identified at the international level, yet it seems to be very low, if not non-existent, on the multilateral agenda.*

I am aware that the title of this conference may seem a bit provocative – "are enforced disappearances disappearing from the multilateral agenda". It may also seem a bit pessimistic. However, I want to support the idea that we are facing a kind paradox: never has the notion of enforced disappearance been so well identified at the international level, and yet it seems to be very weak, if not non-existent, on the multilateral agenda.

I am sure that almost everyone attending this conference knows something about the phenomenon of enforced disappearances – but for those who only have heard of it or who are not too sure – and that is fine! – let me briefly remind you what we are talking about.

And to do so, let me start reading a text – which is actually taken from one of the urgent actions the UN Committee on enforced disappearance sends to governments almost a daily:

> "According to the information provided, on [day X] , Mr Y posted on his personal Facebook the following post: "the blood of the martyrs is more honourable than all the murderous politicians". He was referring to the massacre that had happened a few days before allegedly conducted by Security Forces of the State. In response to that post, he received threats, including one from the cousin of the current head of the Parliament Council, Mr Z.
>
> On the same day, at 8 p.m., four men came to his home by car [model] holding weapons and wearing civilian clothes. They identified themselves as members of the National Intelligence Service. They did not have any arrest warrant. They explained that they did

* Professor at University Paris 2 Panthéon-Assas. Director of the Paris Human Rights Center. Member of the United Nations Committee on Enforced Disappearances. All opinions expressed in this paper are strictly personnal and do not reflect the position of the Committee or of the United Nations.

> not intend to arrest Mr Y but only wanted to interrogate him. They forcibly put him in the car and took him to an unknown place.
>
> According to the information provided, Mr. Y family went to the Police Station and the National Intelligence Service Branch to inquire about his whereabouts, but to no avail. When they returned to the Police Station to submit an official complaint, they were advised not to submit the complaint as it would "affect negatively Mr. Y". Afterwards, the family informally contacted one of the high-ranking officers in the Intelligence and Anti-Terrorism Unit. He told them "not to worry" as he knew the place where Mr. Y was detained. He however did not disclose further information in that regard. […]
>
> To date, the authorities have not provided any information as to Mr. Y's fate and whereabouts."

This is a real case, but it sounds like the archetypal case of enforced disappearance. I presume you can put yourself in the position of this family desperately trying to get some reliable information about what happened to Mr Y. Enforced disappearance is torture not only against the disappeared person, who is thrown into the black hole of secret detention, but also against the relatives, who sometimes suffer for years or decades from the anguish of uncertainty and the impossibility of mourning, not to mention the social stigma and the legal obstacles they endure.

The disappearance of people as a form of political repression, as an instrument of states against peoples is not new. This practice of terror was even legally codified in Hitler's Night and Fog Decree. The program was regarded as a war crime by the Nuremberg International Military Tribunal and also subsequently as a crime against humanity by the US Tribunal in Nuremberg in the so-called *Justice Case*, 4 December 1947:

> "During the war, in addition to deporting millions of inhabitants of occupied territories for slave labor and other purposes, Hitler's Night and Fog program was instituted for the deportation to Germany of many thousands of inhabitants of occupied territories for the purpose of making them disappear without trace and so that their subsequent fate remain secret. This practice created an atmosphere of constant fear and anxiety among their relatives, friends, and the population of the occupied territories."

But the practice did not stop after the Second World War with the end of the Nazi regime. On the contrary, it spread all over the world. Counter-insurgency tactics developed against liberation armies, as in Indochina and Algeria, but also against left-wing political movements, especially in Latin America in the 1970s and early 1980s, but not only there.

The specificity of this form of repression became visible at that time and on this continent as victims began to mobilize. Initially, the United Nations and the InterAmerican Commission raised concerns over "missing persons" – meaning that the reasons why those persons went missing were unknown. But the victims, and especially the mothers of the disappeared, began to talk about "forced disappearances" – by that they meant that the State authorities – the security services – had abducted their loved ones and denied having them. There were, indeed, hundreds of secret detention centres at that time. The Argentinean junta in particular, resorted to enforced disappearances on a large scale. Thousands of victims – kept secret, tortured, executed – were also dropped from helicopters into the Rio de la Plata.

This is how it began, with the Mothers of the Plaza de Mayo with their white headscarves and photos of their loved ones walking around the square and accusing the State and the militaries of being responsible for their disappearances. In response the militaries said they were "crazy" – the crazy women of Plaza the Mayo. They were not crazy, their allegations fell far short of the reality as now uncovered by the trials taking place in Argentina.

**From that time, the issue of enforced disappearances slowly emerged on the multilateral agenda at the regional and international levels.** At the UN level in particular, attention was raised on the situation in Chile – at that time one of the few countries directly targeted by resolutions of the General Assembly or the Commission on Human Rights (CHR) – which was the predecessor of the Human Rights Council. In 1978-79 the GA mentioned the phenomenon of "disappeared persons" in Chile (and not only the "missing").

In 1980, the CHR decided to create a group of five independent experts in charge of examining questions relevant to "enforced or involuntary disappearances of persons": this is the Working Group on Enforced or Involuntary Disappearances (WGEID) which still exists today, and which still fulfils an important mandate – which I will be happy to come back to if there are any questions on this subject. Among many other things, the WGEID helped to identify and clarify the notion of enforced disappearances, including the legal aspects. During the same period, other international bodies began to receive complaints from victims of "enforced disappearances". The UN Human Rights Committee, established to oversee the implementation of the ICCPR issued a number of views on a number of cases of enforced disappearances in Uruguay. The European Commission on Human Rights, two years later, also dealt with the issue in the context of the conflict in Cyprus.[1] In 1988, the Inter-American Court of Human Rights delivered its first landmark judgement in the case of *Velásquez Rodríguez* v. *Honduras*.[2] Finally, the ECtHR adopted a number of judgements in cases of enforced disappearances in Turkey in the early 1990s.[3]

In parallel with these important steps in litigation, progress was also made in promoting the adoption of new legal instruments. In fact the idea of an international convention on the issue came very early on.

In January 1981 a conference was organised in Paris - "the refusal of oblivion" – and the participants decided to launch an international campaign for the adoption of an international convention. A first project was then drawn up in 1982 by the Latin-American associations of relatives, united within the federation of families – FEDEFAM. In 1983, the General Assembly of the OAS adopted its first resolution on the issue of enforced disappearance. Two conferences of civil society were then held in Latin America in 1986 and 1988 to discuss the draft convention. At the regional level, this led to the adoption in 1994 of an Inter-American Convention on Enforced Disappearances. A few years later, in 1998 at the Rome conference, enforced disappearances were again on the spot through the lens of international criminal law as it was listed as a crime against humanity in article 7 of the Statute of the International Criminal Court.

At the UN level, international NGOs such as Amnesty International, the International Commission of Jurists, FEDEFAM and Louis Joinet, who was then the French expert at the Sub-Commission on Human Rights, decided to follow a cautious path – the same that had been followed for the prohibition of torture at the UN, namely: first, to explore the field and test the water through a Declaration to be adopted by a General Assembly resolution, and only then, as a second step, a Convention. After two years of work, the Declaration was adopted on 18 December 1992. After this first victory, the NGOs and Louis Joinet resumed their work from 1996 onwards.

They prepared the text of a draft convention which was first adopted by the Sub-Commission with Louis Joinet as rapporteur, then sent to the CHR in 1998. Until the Commission decided

[1] ECtHR, Case *Cyprus v. Turkey*, report of 4 October 1983, (req. n°8007/77, para. 118).
[2] IACtHR, *Velásquez Rodríguez v. Honduras*, 29 July 1988, Series C No. 4.
[3] Starting with *Kurt v. Turkey*, 25 May 1998, *Rec.* 1998-III.

in 2001 to appoint an independent expert in the person of Manfred Nowak – a former member of the WGEID – to assess the need for a new instrument.

And it is only in 2003 that negotiations began, leading three years after on the 20th of December 2006 to the adoption of the text by the General Assembly. The text was formally opened for signature in Paris on the 2nd of February 2007. 57 states then signed it.

**These various standard setting processes have somehow created a dynamic around the issue of enforced disappearances at the international level.** The key to all this has been the mobilization of civil society organisations and especially the relatives of the disappeared. The first regional/international network of associations was of course FEDEFAM, which was created in 1979 and held its first congress in San José in 1981. Years later, an international meeting was held in the Philippines in 1997, which led to the creation of the Asian Federation Against Enforced Disappearances (AFAD), with the help of FEDEFAM. In 2000, the FIDH, the Collectif des Familles de Disparus en Algérie and the Movement of Support to Lebanese arbitrarily detained (SOLIDA) organised the first Euro-Mediterranean Conference on enforced disappearances in Paris – which in turn led to the creation of the FEMED (that is the EuroMed Federation against enforced disappearances) in 2005.

FEDEFAM, AFAD and members of FEMED and other organisations were present throughout the negotiation process of the Convention from 2003 to 2005. This was greatly facilitated by a program led by a Dutch organisation, the Humanist Committee on Human Right – the program was called "Linking Solidarity" and basically aimed at identifying committees and associations of relatives of the disappeared and bringing them into contact. Linking Solidarity enabled the organisations to meet, coordinate their positions and advocacy and to attend the sessions in Geneva. After the adoption of the Convention, Linking Solidarity also facilitated the creation of the ICAED, namely the International Coalition against Enforced Disappearances. The ICAED was established mainly to promote the quick ratification of the Convention. It operated actively from 2007 to 2013 – when it had to reduce its activities due to a lack of funding.

This activism of civil society actors was supported by a number of States. During the negotiations of the Convention, Latin American countries were very committed to the quick adoption of the Convention, and Argentina played a major role. France has been committed to the issue from the early 1980s. Nicole Questiaux pushed for the creation of the WGEID as the French independent expert of the Sub Commission at that time, and France presented the resolution creating the Working Group. From 1980 onwards, it continued to present every three years the resolution renewing the mandate of the WGEID. Both standard-setting exercises were also chaired by France.

After the conclusion of the negotiation and adoption of the Convention, the idea of a "group of friends" of the Convention emerged. Initially composed of France and Argentina – which became the two main co-sponsors of the resolution at the HRC, the group was later enlarged to include Morocco and Japan.

**In 2007, enforced disappearances did not seem to be a problem of the past** – on the contrary, at that time there was a renewed concern over new "types" of enforced disappearance that had developed in a number of countries in the context of the fight against terrorism. In particular, the program of "extraordinary renditions" appeared to be a particularly sophisticated form of enforced disappearance, reminiscent of the dark times of Plan Condor in the 1970s in Latin America. In a first report to the Parliamentary Assembly of the Council of Europe, Dick Marty exposed what he called a global "spider's web" of illegal US detentions and transfers" throughout Europe. Later on, some of the cases identified were brought before the European Court of Human Rights and the Court delivered its first

judgement in a series with the case of *El-Masri v. the FYROM*. Similarly, in 2010, at the UN level, the WGEID, the WGAD and the two special rapporteurs on Human Rights and Terrorism and Torture published a joint study on the so-called practice of "secret detention" which in fact concerned mostly enforced disappearances, referring especially to the recent surge in the context of the so-called "war against terror".

In 2010 the Convention entered into force – with the deposit of the 20th instrument of ratification by Iraq.

**At that point, it may be possible to say that the place of ED on the multilateral agenda was at its highest. It then started to decrease slowly**. Now things have got to the point where, as I have already pointed out, I wonder whether enforced disappearances are not gradually disappearing from the multilateral agenda.

I would now like to list a few points which, I think, are clear signs of this trend. This is of course notwithstanding all the things that are done by all actors, including recently in the context of the 10th anniversary of the entry into force of the Convention. I am not saying enforced disappearances *have* disappeared, I am saying that there is a trend which raises concern and should trigger a reaction.

1. Insufficient number of ratifications of the Convention

First the pace for the ratification of the Convention is clearly not up to the legitimate expectations. Just compare with another convention that was adopted at the same time as the ICPPED: the Convention on the Rights of Persons with Disabilities (CRPD) has now reached 182 States parties.

You may object that there are understandable reasons for this. You may say, for instance, that the issues are different: all states may *prima facie* feel concerned with the issue of disability, but it might not be the case for enforced disappearances. Well, I would answer that this is a kind of prejudice.When discussing the drafting of the convention, some states were already reluctant to deal with what they thought was a "Latin-American problem". A quick look at the WGEID report is enough to see that since its creation the WG has transmitted 58 606 cases to 109 countries on all continents. But this idea that this is a Latin-American problem seems to be deeply rooted in people's mind.

Another idea is that States that have not experienced enforced disappearances in their history should not feel concerned. Of course, this is again completely wrong: the Convention has a preventive dimension, so States have to change their laws in order to prevent enforced disappearance in the future. And as for the present, by ratifying the convention, States are committing themselves to cooperate in assisting victims and fighting impunity for perpetrators, including through extraterritorial jurisdiction and judicial cooperation.

So, in the end, there is no valuable reason for states not to ratify this treaty. This is all about a lack of education and information: states are not sufficiently aware of the issues.

2. No real campaign for the ratification on the Convention

To strengthen awareness, we would need a strong campaign for ratification. But this is the second sign of this worrying trend I am speaking about: after the first years – from 2007 to 2013, let's say, the campaign for ratification seems to be running out of steam. The group of friends of the convention has limited itself to organising a few conferences and side-events, but no decisive steps are being taken to really promote the ratification on a one-to-one basis, through training programs for instance.

In 2017, on the 10th anniversary of the signing of the Convention, former UN High Commissioner for Human Rights Zeid Al Hussein called in a message to "set today the bold goal of doubling ratifications of the Convention in the next five years" adding that "all together we have the power to achieve this". But that "all together" meant in fact that "no one in particular" was in charge. No action was taken to deliver on this promise, which then appeared in retrospect to be a simple wish. There were 55 States parties at that time, and there are now 8 more, 63 in total, and it is now clear that the target of 110 is out of reach.

The ICAED, which was the pillar of the campaign, is not funded for its activities and it is up to its individual members to undertake actions on its behalf. Visiting the Coalition's website, you will see that all substantive activities – except for a number of statements - have ceased since 2013.

The 10th anniversary of the entry into force of the Convention was the occasion for a number of events and conferences, organised by the WGEID and CED, but also by FEMED, the ICAED and the *Collectif des Familles de Disparus en Algérie* (CFDA), as well as video interviews and declarations produced by the Office of the High Commissioner.

But as valuable as those efforts are, they do not constitute a campaign that would trigger the bold movement towards universal ratification that we need.

3. Some country situations are not considered

A third sign that enforced disappearances are not closely scrutinised anymore is that most of the current "hospots" of enforced disappearances in the world today are not closely monitored by international institutions – with the exception of course the CED and the WGEID.

Certainly there are some situations that do draw the attention of the Human Rights Council and other intergovernmental bodies: see Burundi, Syria or North Korea, and to some extent Libya and Yemen.

But take Iraq, Mexico, which are closely monitored by both the CED and the WGEID, they do not draw the attention of the UN political bodies. The same is true for other states which have not yet ratified the convention but where enforced disappearances still occur, such as Bangladesh, Cameroon, China, Egypt, Nigeria, Pakistan and Turkey.

The same can be said of a number of transition processes that were closely monitored in the past but which now seem to have disappeared from the agenda. I am thinking about Nepal, for instance, which recently reported to the HRC in the context of the Universal Periodic Review: the process of transitional justice is stalled there, and the Human Rights Office closed in 2011. But what about other countries, which, at one point, were under close scrutiny such as Algeria for instance? It now seems that families are being left alone.

4. The lack of sufficient support to the UN mechanisms

A fourth sign is the lack of sufficient support for UN mechanisms. In a way, it can be said that there has not been much change on this front as far as the WGEID is concerned. When I was a member of the WGEID from 2008 to 2014, we already had the same issue: although the WGEID is following up on thousands on individual cases, it is provided by the OHCHR with the regular one-and-a-half staff members to serve as its secretariat. The additional resources needed for the WGEID to fulfil its mandate are provided through extra-budgetary contributions mainly by France, and more recently Japan, Argentina or the Republic of Korea.

The Committee, on its side, has recently drawn up a document in an attempt to anticipate its needs in the coming years. The Committee sits for a total of four weeks during a year, a session duration that was calculated on the basis of the number of States parties in 2015 which now seems clearly insufficient. Recently the CED issued a press release drawing

attention to the fact it had registered its 1000th urgent request to locate victims – the secretariat calculated that in view of the work required at the different steps of this complex procedure, the committee would need additional resources, namely almost 3 additional staff at the P3 level. No response has been received so far. Victims are waiting. And the OHCHR staff, I can testify, is doing their best not to keep them waiting more than the 48 hours that are usually set as a rule to process a request – but for how long can it carry on like this?

There are many other signs I could spell out, like for instance the lack of any multilateral initiative since the adoption of the Convention, the lack of support from States for a number of initiatives taken by the CED or the WGEID – I am thinking in particular of the Guiding principles for the search of disappeared person – the lack of real support that can also be seen in the brevity of the resolutions which are adopted every three years by the HRC: these resolutions used to be long and detailed, they are now two pages long, and "take note" with caution of the recommendations of the CED and the WGEID, without granting any support or promoting it in any way.

One thing that could be opposed to the idea that enforced disappearances are disappearing from the multilateral agenda is the growing attention given to the issue of missing persons. And this is true. The issue of missing persons first appeared on the agenda of the late CHR in early 2000, and it clearly made a new breakthrough in recent years: the GA has adopted a number of resolutions on the issue, the latest being resolution 75/184 adopted on 16 December 2020. And the Security Council itself, after a special debate requested by Kuwait and other States, adopted resolution 2474 in June 2019, calling upon, for instance, all parties to armed conflicts to take all appropriate measures, to actively search for persons reported missing etc.

This issue is actively promoted by the International Committee of the Red Cross at the United Nations. And the ICRC, which had been very active on the issue in the late 90s and early 2000s, has launched a new project on the missing with ambitious goals in terms of connecting peoples and adopting new practical guidelines in a number of fields.

So isn't this activity in relation to missing persons benefiting the promotion of the rights of victims of enforced disappearance? The answer to this question can only be nuanced. The category of "missing persons" does not fit exactly with the category of enforced disappearances. It is *broader* in the sense that persons can go missing for various reasons, including being subjected to an enforced disappearance but not only: a combatant can go missing on the battlefield, a civilian person can be displaced and be in the incapacity to communicate with their families, persons on the move may go missing on the migration route for reasons unrelated to enforced disappearances… At the same time, "missing persons" is also more restrictive than enforced disappearances, as under the Geneva Convention and Protocol I, it concerns people who go missing in the context of an armed conflict – whereas enforced disappearances can also occur in times of peace.

But most importantly, the approach privileged by the ICRC and humanitarian law is a humanitarian approach centred on the needs of the victims rather than on their rights. Justice is not formally excluded, but is clearly seen as a secondary goal in a sequenced process. Conversely the law applicable to enforced disappearances does not create such priorities, for the simple reason that enforced disappearances are crimes and that the victims have an equal right to truth, justice and reparation.

And it is striking that resolution 2474 mentionned above does not even mention "enforced disappearance", nor does it mention the rights of victims – it only recalls in a preambular paragraph the "importance" of truth, justice and accountability.

In this regard, the "missing approach" may prove to be detrimental to the cause of the fight against enforced disappearances, in the sense that it offers an alternative framework for States that are willing, for political reasons, to deal with the issue of enforced disappearances through a "humanitarian approach" versus a more legalistic and judicial approach.

In conclusion, what can we do to counter the negative trend that I have tried to identify? How can we revive the spirit and the positive energy that led to the adoption of the Convention?

*First and foremost*, we and in particular States, must now get serious when speaking about a campaign for universal ratification. A few conferences and side-events will not achieve the results we are aiming at. A model that could serve as an inspiration is the campaign launched in favour of the ratification of the Convention against torture called "Convention against Torture Initiative" (CTI).

*Secondly*, there must be a renewed and strong initiative and support for associations of families of the disappeared. As we have seen, they are the key actors in promoting the convention and raising awareness around the issue of enforced disappearances. More broadly, families and relatives must be supported: meeting and talking for them, across countries, is not a luxury. It is part of the healing process. It is also the key to a more efficient action against a crime that has the same hideous face on all continents. We would need a new "Linking Solidarity process" in support of the families worldwide. More support is also needed for each association at the national level, so that they are in a position to continue to claim truth, justice and reparation before their local governments.

*Thirdly*, States that have experienced enforced disappearances or are currently experiencing enforced disappearances should be encouraged to hold an intergovernmental peer review on good practices – especially on the issues of strategies to search for the disappeared and on the connected issue of investigations.

And finally, *fourthly*, the bodies in charge of the issue of enforced disappearances should be strengthened and their coordination and complementarity facilitated. The CED and the WGEID work well together, but due to a lack of resources and time, coordination with regional mechanisms is insufficient. Recently, the WGEID and the CED started to work more closely with the African Commission on Human and Peoples Rights, but the working relations with regional courts or the Inter-American Commission are too rare so as to create a fruitful synergy.

My call would then go States and civil society organisations to join in holding a *World Forum Against Enforced Disappearances*, which would bring together all stakeholders and interested parties. The Forum could develop a common plan of action to achieve the goal of universal ratification and secure the necessary funds to support the activities planed. It could also be an opportunity to launch a new initiative in favour of victims of enforced

disappearance, so as to support their work at national level and their contacts across borders. And finally it could also be the starting point for a new process of a peer dialogue between interested States so as to better exchange on their respective experiences and good practices in the fight against enforced disappearances.

These are some of the proposals that could be promoted to ensure enforced disappearances do not disappear from the multilateral agenda for the next ten years.