

**THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL
PERSONS FROM ENFORCED DISAPPEARANCE**

**A Human Rights Instrument of the 21st century: Reflections on its 10th
Anniversary of the Entry into Force**

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The International Convention for the Protection of All Persons from Enforced Disappearance, a Human Rights Instrument of the 21st century: Reflections on its 10th Anniversary of the Entry into Force.

Abstract¹

Ten years ago, the newest international human rights instrument entered into force. The International Convention for the Protection of all Persons from Enforced Disappearance represents a significant progress in international law, being the first international instrument recognizing the non-derogable right not to be subject to enforced disappearance. A decade after its implementation and establishment of the monitoring body, the Committee on Enforced Disappearances, the authors of this article undertake an analysis on the achievements up to now and challenges both the Convention and its monitoring body may face in the coming years. The authors will argue that as far as the practice of enforced disappearance is not belonging to the past and is not decreasing, it is imperative to recognize the contemporary value of the goals and objectives of the Convention, to build on its innovative elements, and turn a legal instrument in a changing instrument on the ground to the benefit of the victims of the heinous crime of enforced disappearances.

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The views and opinions expressed here are those of the authors and do not necessarily reflect the position of the Committee on Enforced Disappearances.

1. Introduction

The International Convention for the Protection of all Persons from Enforced Disappearance (the Convention), since it entered into force on 23 December 2010,² has filled an important legal void in the international system, by providing a binding legal instrument to fight enforced disappearances. Enforced disappearance is an offence to human dignity and a violation of multiple human rights, including the right to personal liberty and security, the right to recognition as a person before the law, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, the right to a fair trial, the right to life. Enforced disappearance also violates the economic, social and cultural rights of the disappeared persons and his/her family. As the crime of enforced disappearance constitutes a denial of the victim, through the denial of the "protection of the law", the answer to be given is the affirmation of the law, with a continuous vigilance against any breaches. The purpose of the Convention is precisely to restore the law, at the heart of the demand for justice and reparation, through mechanisms of prevention and protection, early warning and monitoring, investigation and safeguard, with a new form of "*habeas corpus*".

The phenomenon of enforced disappearances was dealt within international human rights law, international humanitarian law and international criminal law, each with its own approach. This meant that the subject of enforced disappearances was dealt with

² The Convention was adopted in 20 December 2006 and entered into force in accordance with article 39.1, on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

under different headings and drafting a consolidated, coherent instrument was therefore justified.³

The Convention constitutes a large step forward in a long historical process. It followed on the blueprint of the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the General Assembly, on December 18, 1992 and the work done by the Working Group on Enforced and Involuntary Disappearances (WGEID), the pioneer and great contributor in the frontline of the fight against enforced disappearance.⁴ Beside the institutional efforts in the UN, there have been inspiring movements against enforced disappearance with remarkable results, which succeeded to show the evidence of the cruelty of this crime and put it to the international attention. Owing to the long struggle of relatives of disappeared persons, families associations and human rights activists around the world, we have an international instrument which codifies enforced disappearance as an international crime.

The UN General Assembly has recognized the importance of the International Convention for the Protection of All Persons from Enforced Disappearance, the ratification and the implementation of which is a significant contribution to ending impunity and to promoting and protecting all human rights for all.⁵

³ *CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF ENFORCED OR INVOLUNTARY DISAPPEARANCES*, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, E/CN.4/2003/71 of 12 February 2003, at 20

⁴ WGEID was the first thematic special procedure created by Resolution 20 (XXXVI) of 29 February 1980, by which the Commission on Human Rights decided to "establish for a period of one year a working group consisting of five of its members, to serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances of persons".

⁵ Resolution adopted by the General Assembly on 18 December 2019. International Convention for the Protection of All Persons from Enforced

During the first decade in action, the objective has been to implement all the potentialities of the Convention, its technical innovations as well as its constructive compromises, to make it a major tool for the eradication of enforced disappearances.

The tragic history of enforced disappearance, its exceptional intensity and its legacy in Latin America, has created two wrong patterns which continue to influence the discussion in present days: first, by connecting the phenomena with a regional dimension and second, by considering it as belonging to the past and isolated in the last century. Our experience at the UN, guide us to confirm that these patterns do not match with the sad reality across the globe. Unfortunately, the practice of enforced disappearance is not belonging to the past, it has not decreased and no region can claim to be immune from this heinous crime. In the context of internal conflicts, transnational organized crime, humanitarian crises, migration and the struggle against violent extremism, we are seeing this old phenomenon revived, as well as the presence of new patterns of enforced disappearance. The ratification map colored in all continents, from Albania and Argentina to Norway and Oman is a demonstration of the universal vacation the Convention.⁶

After ten years of implementation the questions we pose are straightforward: has the Convention achieved to fulfill the high expectations put to it by the victims, the associations of the families, the civil society and the international community? Where can progress be identified, what are the ‘failures’ and the

Disappearance, A Res 74/161, at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/74/161

⁶ Albania and Argentina are the first states parties which ratified the Convention respectively on 8.11.2007 and 14.12.2007, Norway and Oman are the recent states parties which ratified it, respectively on 22.08.2019 and 12.06.2020.

challenges ahead? Is the Convention affective towards the new patterns of enforced disappearances? Have the commitment, efforts, results in the implementation of the Convention achieved an increased protection for all persons from the crime of enforced disappearances?

The authors will try to respond on these points from the angle of their accumulated experience, conclusions drawn and lessons learned from the activity of the Committee on Enforced Disappearances (CED). More than an systematic theoretical approach on the provisions of the Convention⁷, the reflections on the added value and its contemporary nature, will be channeled through the analyses of the monitoring compliance, interpretation and the state of play of the implementation of the Convention. By dividing the article in two main parts, the conceptual and methodological lines will follow the assessment of the progress achieved during this decade and the challenges ahead towards the next one. As the first step of the implementation of the Convention has started with the phase of putting into life the monitoring mechanism, the first part of the article will address the stages through which CED has consolidated its functions provided by the Convention, as its legal guardian and how its work has impacted the implementation of the Convention. Then it will examine the state of play on the implementation of the Convention. The aim of the Convention is simply reflected in its title: to protect all persons from enforce

⁷ On the adoption of the Convention and analysis of its provisions see among others:

-E. Decaux, O de Frouville, *La Convention internationale pour la protection de toutes les personnes contre les disparitions forcees. Les enjeux d'une mise en oeuvre universelle et effective*, Bruxelles, Bruylant 2009

-G. Citroni and T.Scovazzi, *The struggle against Enforced Disappearances and the 2007 UN Convention*, Leiden, Martinus Nijhoff, 2007

-S/ McCrory, *The International Convention for the protection of all Persons from Enforced Disappearance*, *Human Rights Law Review* 7, n.3, 2007

disappearances. This protection encompasses three main objectives: prevention, combating impunity and ensure the rights of the victims to justice and reparation. This session will assess the advancement on implementation on these pillars. In the second part, we will overview on the legal and procedural challenges, with which the implementation of the Convention may be facing in the coming years.

2. Measuring the Decade's Progress of the Convention

On the first part, the achievement and positive aspects of the implementation of the Convention will be emphasized, in two directions, the monitoring of the Convention by its legal guardian and the state of play of the implementations in these 10 years.

A. Effectiveness of the Convention's monitoring

1. The Committee on Enforced Disappearances

The Convention provided for the creation of the Committee on Enforced Disappearances, a body of independent experts which monitors its implementation by the States Parties.⁸

⁸Article 26 of the Convention: 'A Committee on Enforced Disappearances (hereinafter referred to as "the Committee") shall be established to carry out the functions provided for under this Convention. The Committee shall consist of ten experts of high moral character and recognized competence in the field of human rights, who shall serve in their personal capacity and be independent and impartial. The members of the Committee shall be elected by the States Parties according to equitable geographical distribution. Due account shall be taken of the usefulness of the participation in the work of the Committee of persons having relevant legal experience and of balanced gender representation'.

After the election of the first ten members, CED held its first session at the United Nations Office at Geneva on November 2011, and continue to have 2 sessions per year.⁹ Its two first sessions had been of a technical nature, during which it had enacted the practical tools required for the development of its work.¹⁰ The third session marked a turning point in the work of the Committee, during which those tools have been applied.

Alongside with setting up its working infrastructure, CED started by elaborating the substantive understanding of the provisions of the Convention. During its second session, the Committee held two thematic discussions in closed sessions on non-State actors and enforced disappearances, and on women and children and enforced disappearances.¹¹

CED has been the only committee in the system of the human rights treaty bodies to have had since its creation, ‘the sword of Damocles’ over its head.¹² The dynamics of the negotiation of the

⁹ At the end of September 2020, the Committee has held 19 sessions, each of 2 weeks, with exception of the last two due to the covid-19 pandemic situation, the 18th session was opened remotely on 4 May 2020, and the 19th session on hybrid format on September 2020.

¹⁰ At its second session, held in March 2012, the Committee adopted its rules of procedure (CED/C/1) as well as the guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2).

It decided to endorse the Dublin II outcome document on the treaty body strengthening process.

The Committee further decided to appoint a Special Rapporteur, a deputy and an alternate to consider urgent action requests and issue interim or protection measures between sessions, as provided for in article 30 of the Convention

¹¹ Report of the Committee on Enforced Disappearances, First and Second Session, A/67/56

¹²Article 27 provides that: ‘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, in accordance with the functions defined in articles 28 to 36.’

Convention reveal that the review provision provided in article 27 has been one of the compromises of the negotiating process, during which the reluctance to add another new body to the already overburdened UN system, which was under pressure for reforming, was discussed intensively. The Conference of States parties, took place 6 years after the entry into force of the Convention and adopted by consensus the following decision¹³:
“The Conference of States parties to the International Convention for the Protection of All Persons from Enforced Disappearance decides that the Committee on Enforced Disappearances continue to monitor the International Convention for the Protection of All Persons from Enforced Disappearance in accordance with the functions defined in articles 28 to 36.”
The outcome of the Conference was an expecting result, as experience has proven that an organ dedicated to the monitoring of this innovative legal instrument is essential for addressing the specific crime of enforced disappearances. More than ever the existence of a specialized committee independent guardian of a convention with universal vocation, is necessary for guaranteeing its full efficacy.¹⁴ At the same time it was a confirmation on the trust put to CED, an acknowledgment of its efficiency. The Committee gained the appreciation of both civil society and States and proved to be a valuable tool in the struggle against this heinous crime under international law.¹⁵ Since its creation in

¹³ The Conference of States parties was convened in Geneva on 19 December 2016. A total of 51 States parties were present at the session, 22 of them took the floor, as did representatives of the Working Group on Enforced or Involuntary Disappearances, the International Committee of the Red Cross, the Global Alliance of National Human Rights Institutions and civil society.

¹⁴ Intervention of France at the First Conference of the States Parties, at <https://www.ohchr.org/Documents/HRBodies/CED/Convention1Session/France.pdf>

¹⁵ Citroni Gabriella, “The first years of the United Nations Committee on Enforced Disappearances: achievements and future challenges”, at *Reciprocite et Universalite, Sources and Regimes du Droit International des Droits de l’Homme*, Pedrone, 2017, at 392

November 201, the Committee on Enforced Disappearances made the difference.¹⁶

Another distinctive element on the legal framework of the Committee is included in article 28 of the Convention, referring to the cooperation with the stakeholders.¹⁷ While for other treaty bodies this cooperation is built on good will and good practices, for the first time in an international human rights convention, it is provided for the cooperation as a legal duty. CED has immediately put to practice his frequent exchanges with all relevant bodies and created the physiognomy of an open and active treaty body.¹⁸ It is the only committee which meets each session, not only with states parties but will all Member States, interested to follow its work. Especially, the Committee has put particular emphasis on strengthening the cooperation with the Working Group on Enforced or Involuntary Disappearances (WGEID). Pursuant to article 28 of the Convention, since its creation CED, has approached the WGEID as its natural partner. Yearly meetings have taken place with exchanges on working methods, thematic priorities and country visits. Beside some

¹⁶ Joint statement of International non-Governmental Organisations , at the First Conference of States Parties, <https://www.ohchr.org/Documents/HRBodies/CED/Convention1Session/GHR%20and%20others.pdf>

¹⁷ Article 28.1 reads: “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”.

¹⁸ The committee held formal meetings with the Human Rights Committee the Committee on the Rights of the Child, the working group on Arbitrary Detention, the Special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Committee against Torture and the Committee on Migrant Workers.

practical issues on combining the sessions to profit as much as possible from direct discussions, the level of cooperation has resulted satisfactory. Taking into account that these two organs, in accordance with their respective mandates, are at the forefront of the fight against enforced disappearances, it is essential that they continue to be complementary and mutually reinforcing each-other. But at the same time, it is expected they could be more ambitious, go beyond the established practice of exchanges, and deepen the coordination especially on the tools that seems of the same nature.¹⁹ This is not only delivering to the request of States and civil society to avoid overlaps between the two, but is essentially a need to shed light and guide the victims of enforced disappearances to a clear path of addressing their complains in the UN system. As agreed by the two organs coordination and coherence are essential to guarantee the effective protection of victims of enforced disappearances.²⁰

From the beginning of its activities, CED has considered that the cooperation of local, national and international civil society actors, especially associations of relatives of disappeared persons, working on the promotion and protection of human rights in general, and on the fight against enforced disappearances in particular, is essential for the promotion and implementation of the Convention. At its fifth session in November 2013 CED adopted a document on the relationship with civil society,²¹ in

¹⁹ Reference is to the Urgent Appeals, a procedure similar to the Urgent Actions at CED: The WGEID transmits directly (within 1 or 2 days after receipt) to the Ministry of Foreign Affairs of the country concerned, through the Permanent Representative to the United Nations Office in Geneva, cases that occurred within the 3 months preceding receipt of the report. For cases that happened before the 3 said months (standard cases), the Group may authorize transmission to the government concerned, requesting to carry out investigations and inform it about the results.

²⁰ Statement on the 4 joint meeting of CED and WGEID
<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15087&LangID=E>

²¹ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/3&Lang=en CED/C/3 at

March 2014 the guidance for the submission of a request for urgent action and the guidance for the submission of an individual communication under articles 30 and 31. During the review of States Parties, particular attention has been put on the consultation with civil society to prepare the reports, if it is not the case, the relevant recommendation urge to do so. From the other side, the cooperation and support extended to CED, by the civil society has been very valuable in assisting it to discharge its mandate effectively by providing at any time genuine, factual and focused information in relation to the different activities that the Committee may carry out in accordance with the Convention and in particular play a key role in assisting victims of enforced disappearances to access the Committee.

In September 2014 CED approved a document on the relationship with national Human rights institutions.²² It meets regularly with the representatives of national human rights institutions. The Committee has noted in this document that, in order to fulfil their roles effectively, national human rights institutions should be established, and where necessary strengthened, in full compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). The view of the Committee has been retaken in almost all concluding observations to the relevant States parties to establish and/or strengthen national human rights institutions, with adequate resources and in full compliance with the Paris Principles, with specific reference to

²² CED/C/6 at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/3&Lang=en

their mandate should include issues related to the prevention of, and fight against, enforced disappearances.²³

CED was introduced as the tenth human rights treaty body, in a particular moment of a general debate on the reform of the system. Even though it did not participate in the initial discussions, it supported the treaty body strengthening process and endorsed the Dublin II Outcome Document during its second session, in March 2012. Since then, CED has participated in all discussions and advocated the importance of the strengthening of the United Nations human rights treaty body system as a whole, in order to reinforce its coherence and its efficiency.²⁴ The specificities of the International Convention for the Protection of All Persons from Enforced Disappearance, as a new and modern legal instrument, has facilitated the endorsement with consensus and smooth implementation of all relevant measures.

2. Monitoring the implementation of the Convention

The Convention offers a range of different tools for its implementation, from the traditional ones, to specific and innovative ones. During its activity, CED has applied some of them meanwhile some others are not yet used and need to be developed in the future.

²³ See among others :Concluding observations of Uruguay, p.10, Paraguay, p.12, Spain p.28, Armenia p. 10, Slovakia, p.11, Italy, p. 11, Tunisia p.11

²⁴ Statement by the Committee on Enforced Disappearances on the report of the United Nations High Commissioner for Human Rights on Strengthening the United Nations human rights treaty body system (June 2012), at <https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12780&LangID=E>

(a) Consideration of reports submitted by states parties

The reporting process is the traditional tool inherited from the system.²⁵ In the Convention this essential function of a treaty body is presented under a reformative approach. States parties have the obligation to present only one report, within two years of the entry into force, avoiding the periodic cycle of reporting. This innovative element has been the result of the negotiating process, reflecting the ‘reporting fatigue’ from which the system has been suffering for a long time. This particularity has been embraced by states parties, for which ‘the single reporting is precisely what renders this Convention attractive’.²⁶ The Committee itself, has been careful to adopt its procedures accordingly with the limits put by the Convention. It has developed treaty-specific reporting guidelines to advise States Parties on the form and content of the reports which shall be submitted to the Committee under article 29 of the Convention, so as to ensure that the said reports are comprehensive.²⁷

Until September 2020, the Committee has reviewed the reports of 33 State parties and adopted concluding observations on those

²⁵ Article 28.1, provides that: Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, 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.

²⁶ Belgium and Netherlands intervention in the First Conference of States Parties at <https://www.ohchr.org/Documents/HRBodies/CED/Convention1Session/Belgium%20and%20The%20Netherlands.pdf>

²⁷ Guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention, adopted by the Committee at its second session (26–30 March 2012), CED/C/2

reports. In order to enhance the effectiveness of the consideration of States Parties' reports and to continuously improve the quality of the constructive dialogue with reporting States, the Committee appoints from among its members two or more country rapporteurs for each report. The examination of a report takes the form of a dialogue between the delegation from the reporting State and the Committee members held in public meetings. The aim of the dialogue is to enhance the Committee's understanding of the situation in the state party as it pertains to the Convention and to provide advice on how to improve the implementation of the Convention provisions in the state party. The dialogue also provides an opportunity for the state party to further explain its efforts to give effect to its obligations under the Convention as well as to clarify the contents of its report to the members of the Committee. The Committee adopts Concluding Observations on the reports of states Parties which are discussed and adopted in a closed plenary meeting by the Committee following the examination of the State party's report. The Concluding Observations follow a standard format which consists of a brief introduction, followed by a section noting positive aspects, another with the subjects of concern and related recommendations, and a last one on follow-up and dissemination. The Committee may also identify certain issues of particular concern to be followed up and the state party may be requested to provide additional information in respect of these issues within a specific short period of time.²⁸ The Committee may also request the State concerned to submit, within a specific period of time, additional information in conformity with article 29, paragraph 4, of the Convention, identifying the areas in which the State party

²⁸ The established practice of CED is to select three concluding observations which are particularly serious, urgent, protective, and can be achieved within short periods of time to be followed within one year.

has to focus its attention. The Committee has appointed a Follow-up Rapporteur, who shall assess, in consultation with the country rapporteurs, the information provided by the State party and report at every session to the Committee on her/his activities. This report does not constitute an assessment of the implementation of all the recommendations made to the State party in the concluding observations, nor a comparison between states parties. Article 29/3 provides for wider competences for CED to request states parties to provide additional information on the implementation of this Convention. This provision has been a compensation on the limits of CED to regularly review the situation, especially in those countries with a pattern of enforced disappearances. Most recently, in November 2018, CED developed a procedure to address additional information submitted by states parties under this provision. The first ever country that was considered under this procedure was Mexico and the overall assessment of the review was positive, with a constructive engagement of that State party with the Committee, which has set a good precedent for the future of this procedure.²⁹

(b) Individual communications

Under article 31 of the Convention, CED may receive and consider individual communications, also called complaints, if the State party in question has declared that it recognized this competence of the Committee. The legal and procedural nature of this competence is equal with that of other treaty bodies, who's competence provide for the consideration of individual

²⁹ Iraq should have been the second State Party to undertake such procedure during the 19 online session (7-25 September 2020), for reasons linked with the pandemic, the dialogue has been postponed.

complains by their respective conventions. CED considers first the admissibility of the communication under the criteria set forth in the Convention and its rules of procedure and, if it is admissible, will decide on its merits. The decisions are considered to be of a quasi-judicial character. On 20 September 2013, the Committee registered its first communication under article 31 of the Convention and initiated the corresponding procedure.³⁰ At its tenth session, CED examined the communication No. 1/2013 (*Yrusta v. Argentina*) on the merits. It concerned Roberto Yrusta, a prisoner in Argentina, whose family was denied any information about his whereabouts for a period of around seven days, during which he was moved from a prison in Cordoba to one in Santa Fe Province. The Committee found that Mr. Yrusta had indeed been subjected to enforced disappearance as he could not communicate with his family, nor consult a lawyer, and as the authorities concealed or refused to acknowledge whether he had been transferred despite repeated requests from his relatives. In its decision, the Committee reaffirmed that there was no temporal element for an enforced disappearance and that a secret detention could take place also in an official prison, for example when the authorities do not provide information about the detainee. The decision on the first case it's not only important on laying the foundations of CED's jurisprudence, but mostly on the substantial conclusion on the discussion of the temporal element on the crime of enforced disappearances. The issue of the temporal element have attired the discussion on the Human Rights Committee, as well as developed in theoretical analysis.³¹

³⁰ Views approved by the Committee under article 31 of the Convention for communication No. 1/2013, at [CED/C/10/D/1/2013](#)

³¹ Citroni G, *When is it enough? Enforced Disappearances and the Temporal element*, Droit Fondamentaux, n.9, 2013, at 1-28.

CED concluded that the acts to which Mr. Yrusta was subject over the period of more than seven days following his transfer to Santa Fe constitute an enforced disappearance, in violation of articles 1 and 2 of the Convention.³² After this first landmark view, CED has had not opportunities to deliver on another substantial topic. This situation has roots in the low number of states parties which has accepted the Committee's competence on article 31, which will be discussed in the challenges section.

(c) Urgent actions

The urgent action procedure is unique in the entire human rights system, based on its preventive nature, by which the families and relatives can address the Committee to request urgent measures to be taken in order to locate their beloved ones who have been disappeared. Article 30 of Convention bestows the Committee on Enforced Disappearances the competence to receive and consider requests, submitted by the relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as any other person having a legitimate interest, that a disappeared person should be sought and found as a matter of urgency. From 2012 to September 2020, CED has registered around 1000 urgent action requests. In the last two years there is a growing trend on the urgent actions presented to CED, with 79% cases more than in previous years. The majority of registered urgent actions are still related to events that have occurred in Mexico and Iraq.³³ The requests for urgent

³² *Views approved by the Committee under article 31 of the Convention for communication No. 1/2013*, CED/C/10/D/1/2013 at 10.4

³³ Report of CED, A/74/56 ,at 35

action may only be received if the enforced disappearance has occurred in a country that is a state party to the Convention and if it commenced after the entry into force of the Convention for the State party concerned. States parties have not the faculty to accept or not the competence of CED, differently from article 31, the obligation to cooperate with CED remains at the state Party for as long as the fate of the person sought remains unresolved. The Committee first considers the admissibility of the request under the criteria set forth in the Convention and its rules of procedure. The request for urgent action will not normally be considered by CED if the same matter is being examined under another procedure of international investigation or settlement of the same nature, in particular the urgent actions of the Working Group on Enforced or Involuntary Disappearances. If a request for urgent action is admissible, the Committee shall request the State party concerned to provide information on the situation of the person sought, within a time limit set by the Committee. In light of the information received, or if no information is received, the Committee may transmit recommendations to the State party, including that it takes all the necessary measures, including interim measures, to locate and protect the person concerned, and to inform the Committee within a specified period of time. CED continues its efforts to work with the state party concerned for as long as the fate of the person sought remains unresolved. It maintains both, the state party concerned and the author(s) of the request, updated about any information received from the other and will regularly remind the State party concerned that the fate of the person remains unresolved. An urgent action is closed when the missing person has been found at liberty or located and released, or has been found dead, provided that the relatives and/or authors do not contest these facts. An urgent action is kept open when the

disappeared person has been located but the persons to whom interim measures have been granted in the context of the urgent action are still under threat. In such cases, the actions taken by CED are limited to following up on the interim measures. In the majority of requests for urgent action, the authors sought the adoption of interim measures to protect the family and relatives against threats and to allow them to continue searching for and locating the disappeared person. They make frequent references to threatening acts carried out by the state authorities, such as patrols or the presence of officers around their homes, threatening telephone calls or letters, pressure on their children and direct threats not to report events or to abandon their search for the disappeared person. In some cases, the authors also reported physical threats to their representatives and the death of individuals involved in the search for the disappeared persons. The requested interim measures of protection were granted whenever the information provided showed that persons faced a risk of irreparable harm to their life or their physical and psychological integrity. In such cases, the State concerned was requested to listen to the needs and views of the individual to be protected prior to implementing any interim measures. Since the establishment of CED, 83 interim measures have been granted in the context of the urgent action procedure to victims' families or representatives. The States parties concerned have also been asked to protect mass graves and evidence in connection with 11 registered requests for urgent action.

The frequency and importance of the urgent actions, has urged CED to build on its expertise and experience and develop some

standards for the search for the disappeared persons, after a broad consultation process.³⁴

3. Interpretation of the Convention by its monitoring mechanism

In assessing the interpretative activities of CED, we will not touch upon the general debate on the legitimacy of treaty bodies to interpret their conventions, but align with the more proactive approach of recognising to the body that has been entrusted with monitoring compliance, a role in its interpretation, and that treaty bodies are legal bodies which are well equipped to apply legal rules of interpretation³⁵ In principle, CED is well positioned to apply legal rules of interpretation, without compromising its legitimacy.³⁶ Acknowledging the legal limits but the Convention and the Vienna Treaty, with the aim to provide consistency and predictability during the monitoring process, CED has issued two substantive statements, on the *ratione temporis* element and on military jurisdiction. Both statements are of particular importance and sensitivity in relation to the implementation of the Convention.

³⁴Guiding principles for the search for disappeared persons, CED/C/7 In total, 46 submissions were received, 28 from organizations of victims and civil society, 1 from a national human rights institution, 3 from specialized agencies and United Nations entities, 2 from intergovernmental organizations, 9 from States parties, and 3 from academia.

³⁵ Mechlem, Kerstin, *Treaty Bodies and the Interpretation of Human Rights*. J. Transnat'l L. 905 (2009) at 908

B. Schlutter, Aspects of human rights interpretation by the UN treaty bodies. In H. Kelles & G. Ulfstein (Eds), *UN Human Rights Treaty Bodies: Law and Legitimacy (Studies on Human Rights Conventions)*, Cambridge, 2012, at 261-319

³⁶ CED is among the 3 human rights treaty requiring participation for members with legal experience.

The interpretation on the competence “ratione temporis”

The element of *ratione temporis* has been intensively discussed during the negotiation process of the Convention, which resulted in the inclusion of article 35. Unavoidably, the discussion reappeared during the discussions over the first group of reports presented. The objective of the substantive statement of the Committee is to clarify the scope of its functions *ratione temporis*, in order to provide consistency, predictability and legal security for States parties as well as for victims.³⁷ In the view of this statement, the Committee is bound by article 35 in the exercise of its competence and cannot adjudicate individual cases concerning enforced disappearances as such which commenced before the entry into force of the Convention for the state concerned. 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. 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.

This line of interpretation has prompted some reactions. One state party has requested to CED not to consider the status of

³⁷ STATEMENT ON THE RATIONE TEMPORIS ELEMENT IN THE REVIEW OF REPORTS SUBMITTED BY STATES PARTIES UNDER THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE, at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=2&DocTypeID=9&DocTypeID=68

implementation of its obligation with regards to enforced disappearances commenced before the entry into force of the treaty. In the preliminary information, in the report and under the heading “List of issues”, Spain submitted that the competence *ratione temporis* of the Committee is to be strictly interpreted in the light of article 35 of the Convention.³⁸ This interpretation disregards the continuous nature of the offence and would deprive the Committee of much of its use.³⁹ Even after the dialogue with the Committee and the presentation of the concluding observations Spain maintains all the arguments and conclusions put forward at that time.⁴⁰ From the time of the first discussions on this topic, the Committee has maintained a constant approach, by addressing the events of the past in the light of its substantive statement. It has emphasized the continuous nature of the crime of enforced disappearance and to reaffirm the rights of victims to justice, to reparation and to know the truth about the circumstances of an enforced disappearance, the progress and results of the investigation and the fate of the disappeared person, regardless of when the enforced disappearance was committed.⁴¹

Also among the experts, a member of CED retained a different interpretation on the CED competences related to article 35. According to this view, the interpretation of the Committee is favorable of the rights of the victims, but it does not contribute

³⁸ Report of Spain to CED 28 January 2013, CED/C/ESP/1, p 5.

³⁹ Supra note 16, at .406

⁴⁰ Additional information submitted by Spain under article 29 (4) of the Convention, received 17 December 2019, CED/C/ESP/AI/1

⁴¹ Concluding Observations for Japan p. 25, Paraguay p. 18, Bolivia p. 10, Peru p. 10, Albania p. 36.

to the encouragement of the states to ratify and finally impede the universality of the Convention. It cannot be denied that, from the publication of the interpretative declaration, the pace of the new ratifications has been slow down and the competence of the Committee to examine individual communications has especially suffered⁴².

The authors argue that the low pace of ratification of the convention has not been influenced by the substantive statement of CED, but is more linked with the complex nature of the crime of enforced disappearance and the lack of political will to engage in its fight. This point will be deepened in the challenges section. The interpretation of the competence *ratione temporis* is guided by the victim-oriented approach of the Committee. After the issuing of this statement, the activities of CED demonstrate that the right balance has been preserved between the limits and the effectiveness of its competences.

The interpretation on Military jurisdiction

The Convention is silent on the exercise of military jurisdiction in cases of enforced disappearances. The omission of an explicit reference to a prohibition on military courts having competence in cases of enforced disappearance was one of the consequences of diplomatic negotiations aimed at having the text adopted by consensus. The jurisdiction of military courts in case of gross violations of human rights, whether the victims are military or civilians, has become an important question confronting the

⁴² Lopez Ortega, Juan Jose, *Bilan de la mise en oeuvre de la convention pour la protection de toutes les personnes contre les Disparitions Forcees, dix ans apres son adoption*, at Reciprocité et Universalité, Sources et Régimes du Droit International des Droits de l'Homme, Pedone, 2017, 369-371

CED as it performs its duties, notably in its consideration of States parties' reports under article 29 of the Convention.

During its sixth session, on 25 March 2014, the Committee held a public thematic discussion on enforced disappearance and military justice. Based on this contribution, CED approved the substantive statement on enforced disappearance and military jurisdiction on 13 February 2015, with a view to clarifying its guidance to States parties for its review of the measures taken to give effect to States parties' obligations to implement the Convention.⁴³ Taking into account the provisions of the Convention and the progressive development of international law in order to assure the consistency in the implementation of international standards, the Committee reaffirms that military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearance.

During its practice, the Committee has expressed its concern in the cases where the military courts are apparently competent to investigate, hear and try offences of enforced disappearance committed in a military context. The Committee considers that, as a matter of principle, military courts do not provide the independence and impartiality required by the Convention to deal with human rights violations such as enforced disappearances.⁴⁴

⁴³ *STATEMENT ON ENFORCED DISAPPEARANCE AND MILITARY JURISDICTION*

at
https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_SUS_7639_E.pdf

⁴⁴ Concluding Observations for the Netherlands, p 18-19, Spain p.16, Belgium p. 22, Chile p. 15, Colombia p. 2, Tunisia p.21

B. The state of play of implementation

By ratifying the Convention a state party takes the obligation under international law to implement it and take all the necessary measure to ensure the realization of all rights in the Convention. The first check on the catalogue of the obligations starts with the legal framework in place in the state party, it should ensure that the domestic legislation is fully compatible with the Convention and it's principles and provisions can be directly applied and appropriately enforced in the territory of the state party. The Convention is not fully self-executing, its provisions for the punishment of the crime of enforced disappearance cannot be directly invoked before the courts of states parties, in absence of the relevant domestic legislation which criminalize and provide the penalties for the crime of enforced disappearances. For this reason, in order to assess the implementation in a state party, it is necessary to start with a reflection on the need to take the necessary legislative measures for providing for a specific offence, with all elements elaborated in the Convention. Then the analysis on the prevention, protection against impunity and rights of the victims of enforced disappearance, will follow.

1.The domestic enforcement of the Convention

In the reality of different legal orders the Committee has payed particular attention to the status of the Convention in the domestic legal order, i.e. with respect to the Constitution and the ordinary legislation. The question on the direct applicability of the Convention and how its provisions can be invoked before and are directly enforced by the courts or administrative authorities,

have been an integral part of almost all the list of issues and during all dialogues with the States Parties. The Committee has called upon the states parties, where it could not satisfactory have assurances on that regard, to take all the necessary measures to ensure the direct applicability of the provisions of the Convention.⁴⁵

The prohibition of enforced disappearance is absolute, no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. On the reflection of this article in the domestic framework, CED has invested its strict interpretation during the review of the reports on the States parties, by noting with concern the cases where the domestic law does not specifically provide for the non-derogability of the prohibition of enforced disappearance under any exceptional circumstances and by asking to take the necessary steps to ensure that the absolute prohibition of enforced disappearance is enshrined in the national legislation. This request in the concluding observation was not present from the beginning of its activity, but has been reinforced in the recent concluding observations by recommending to States Parties to adopt a legal provision explicitly affirming that no exceptional circumstances whatsoever may be invoked as a justification for enforced disappearance.⁴⁶

While for the legislative need for a specific provision in the domestic legislation on non-derogability CED needs to

⁴⁵ See Concluding Observations for the Netherlands p. 13 and Bosnia and Hercegovina p. 12.

⁴⁶ See Concluding Observations for Italy p. 13, Peru p. 13, Japan p. 12, Tunisia p. 13.

harmonize its position and language, there is one legal requirement, on which its position has been solid and unnuanced, that is on obligation to provide for the criminalization of the offence of enforced disappearance in the domestic legislation. This obligation derives from Article 4 of the Convention which states that: *‘Each State party shall take all the necessary measures to ensure that enforced disappearance constitute an offense under its criminal law’*.

(a) Enforced disappearance as a specific crime in the national legislation

A number of states admit that they have not yet incorporated the crime of enforced disappearance in to their domestic legislation and argue that their legislation provides safeguards from various offences which are linked with enforced disappearances or are closely related to it such as abduction, kidnaping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. This position argue that “the existing norms suffice to prosecute and sanction cases of enforced disappearance”.⁴⁷ The Committee has expressed its concern on the cases where the national legislation do not specifically criminalize enforced disappearance as an autonomous offence in accordance with article 2 of the Convention. Other offenses that may form part of a type of enforced disappearances are not sufficient to cover all the elements of enforced disappearance and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection. In cases where in the absence of a definition and

⁴⁷ See the Concluding Observations for Germany CED/C/DEU/CO/1, p. 7

criminalization of enforced disappearance, the State party has referred to the general legal regime or to criminal rules relating to other, related offences, the Committee has considered that the reference to a range of existing offences and the relevant regulations is not sufficient to meet the state party obligation, as the offence of enforced disappearance is not a series of different crimes, but rather a single complex offence, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, that violates various rights.⁴⁸ In this context, the Committee has argued that the definition of enforced disappearance as a separate offence would enable the State party to comply with the obligation under article 4, which is closely related to other treaty obligations concerning legislation, such as those in article 6, paragraph 1 (a), and article 7 (arts. 2 and 4). In the Committee's view, such a definition would also make it possible to correctly encompass the many legal rights affected by enforced disappearances.

The Convention presents a solid definition of the crime of enforced disappearance in Article 2 as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." This definition encompasses three cumulative elements, the deprivation of liberty against the will of the person concerned the involvement of the state officials or indirectly by acquiescence

⁴⁸ See the Concluding Observations for Belgium p.17-18 Armenia , p.11, Serbia p.10 , Montenegro, p 8

and the refusal to disclose the fate and whereabouts of the person concerned.

During negotiations for of the Convention some states' position was that the placement of the victim outside the protection of the law should be considered an additional constitutive element of the offence, rather than an inherent consequence. CED has been clear in putting the line that the placement of the victim outside the protection of the law is a consequence and not an additional constitutive element of the crime.⁴⁹ The Committee checks on the formulation of the definition of enforced disappearance has been strictly on following the precise language of Article 2 of the Convention. It has recommended to a state party to adopt a definition of enforced disappearance as a separate offence in line with article 2 of the Convention and avoid altering the text by changing the position of phrases in sentences or introducing new expressions.

States parties should include enforced disappearance as independent offence in their criminal codes with appropriate punishment. The Convention does not refer to specific level of penalties, but provides for the general principle that it should be by appropriate penalties which take into account its extreme seriousness. The Committee has examined the variety of punishment provided in the domestic legislation of States parties, from fines to the death penalty, by excluding this two limits as incompatible with Article 2. In one case it has asked to removing the possibility of imposing fines as a stand-alone penalty for the

⁴⁹ See the Concluding Observation for Paraguay, p. 13, for France p. 12. for Spain p.9, for Bolivia p. 13.

offence of enforced disappearance.⁵⁰ As with regards to specific cases, Committee has noted that the minimum (5 years) and maximum (15 years) sentences for an autonomous crime of enforced disappearance, it is concerned that the minimum sentence is not commensurate with the extreme seriousness of the offence.⁵¹

States parties may establish mitigating or aggravating circumstances in relation to the crime of enforced disappearance. The Committee has invited the states parties to consider including mitigating circumstances in the law as a measure that might help in recovering the disappeared person alive or make it possible to clarify some cases of enforced disappearance or to identify the perpetrators of an enforced disappearance. The establishment of mitigating or aggravating circumstances provided for under article 7 of the Convention is not compulsory. Nevertheless, the Committee considers that the establishment of mitigating circumstances could help to clear up certain cases of enforced disappearance. It also recommends the state party to ensure that mitigating circumstances will in no case lead to a lack of appropriate punishment.⁵²

(b) Enforced Disappearances as a crime against humanity

The crime of enforced disappearance for individual acts is serious, but in cases of widespread or systematic practice it constitutes a crime against humanity. The Convention does not regulate this regime, but refers it to the applicable international

⁵⁰ Concluding Observations for the Netherlands, p.16-17.

⁵¹ Concluding Observations for Bolivia p.12

⁵² Concluding Observation for Germany p. 9, Concluding Observation for Japan, p.15

law. CED has singled out as the relevant applicable instrument the Rome Statute for the International Criminal Law. By not entering into the confrontation of the two different instruments, it has been focused on the importance of providing replies in the legal framework of the States Parties, if the extreme situation of widespread or systematic enforced disappearances has been practiced. For assuring full protection, the legislation should include the offence of enforced disappearance in both of its forms, as a separate offence in accordance to article 2 and as a crime against humanity in accordance with article 5.⁵³ The Committee has recommended that the State party explicitly recognize enforced disappearance as a crime against humanity, in line with article 5 of the Convention.⁵⁴

A significant number of states criminalize enforced disappearance as a crime against humanity, referring to the Rome Statute. States cannot limit the criminalization of enforced disappearances only to those instances which would amount to crimes against humanity in the sense of the ICC Statute, but should encompass in the definition of the offence any kind of such act. This is certainly not sufficient as experience shows that enforced disappearances often do not occur as part of a widespread or systematic attack against civilians. In this perspective criminalizing enforced disappearance in domestic law only when committed in this specific context implies that many acts of enforced disappearance remain outside the scope of domestic law and the jurisdiction of national courts.⁵⁵

⁵³ Concluding Observations for Bolivia p. 13.b, Iraq p. 14

⁵⁴ Concluding Observations, Italy p. 15

⁵⁵ WGEID *“Best practices on enforced disappearances in domestic criminal legislation”* A/HCR/16/48, 28 December 2010, para 16.

2.Prevention of enforced disappearance

The preventive nature remains at the heart of the of the Convention. It has inclusive importance to all states parties, but it is particularly meaningful to those who have not had worrisome experiences with enforced disappearances. No country is immune and all need to have in place the system which prevents the occurrence in the future. The Convention provides for the necessary tools.

(a) Preventing secret detention

States parties are under a special obligation to safeguard rights of persons deprived of their liberty and to take effective measures to ensure, that the deprivation of liberty will not at any time become secret detention or an enforced disappearance. For the first time in an international instrument the prohibition of secret detention is clearly indicated as an obligation of the State. Pursuant to article 17 of the Convention, states parties should ensure that the relevant information concerning a person's deprivation of liberty and his or her detention is available in detailed, accessible registers. Furthermore, pursuant to article 18 of the Convention, States parties shall "guarantee to any person with a legitimate interest [...], such as relatives of the person deprived of liberty, their representative or their counsel, access to at least the following information: [...] The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer".

These obligations has been explained in the jurisprudence of the Committee. In the case of Mr. Yrusta his family members did not receive any information about his whereabouts and were not even told that he had been transferred to another prison. Although the right of family members to obtain information about a person's arrest and place of detention may be restricted, such restriction is subject to very strict conditions as set out in article 20 (1) of the Convention, which, judging from the available information, do not apply in the present case. ⁵⁶

(b) Preventing refoulement

The principle of non-refoulement applicable to enforced disappearance is complimentary to the general rule on non-refoulement applicable where there is a well-founded fear of persecution.⁵⁷ In particular, states are prohibited from exposing an individual to a risk of enforced disappearance. This prohibition is expressed explicitly in article 16 of the Convention which states that: "*No State Party shall expel, return (refouler), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.*" This provision has adopted similar language with the Convention Against Torture.⁵⁸ During these years of CED activity, there have been no individual complaints addressing

⁵⁶ Supra note 31, p. 10.6

⁵⁷ On this subject see Janina, S. at Reciprocité et universalite, Sources et regimes du Droit Intenational des Droits de l'Homme, Melanges en l'honneur du Professeur Emmanuel Decaux "Non refoulement obligations under the *International Convention for the Protection of All Persons from Enforced Disappearance*", 467- 485 A. Pedone, 2017

⁵⁸ The slight difference remains in the use of the word 'surrender' which is not found in article 3 of CAT and the addition of 'serious violations of international humanitarian law' as a reference for determining substantial grounds of the danger of enforced disappearance.

Article 16 of the Convention. However, in state reporting procedure, issues related to the implementation of Article 16 have been frequently raised. Two points are most relevant to CED recommendations. The first requires the reflection of prohibition on refoulement contained in Article 16 in the domestic legislation of States Parties, recommending “*that the State party consider incorporating into its domestic legislation an explicit prohibition against carrying out an expulsion, return, surrender or extradition where there are substantial grounds for believing that the person would be in danger of being subjected to enforced*”⁵⁹. The second point refers to the obligation of states parties to adopt the measures necessary to guarantee that the principle of non- refoulement is respected in practice, by ensuring that before proceeding to an expulsion, return, surrender or extradition, a thorough individual examination is carried out to determine whether there are substantial grounds for believing that the person concerned might be at risk of being subjected to enforced disappearance.⁶⁰

CED has analyzed the impact of the declaration of a state party on article 16 if it amounts to a reservation which may impact the protection of persons from enforced disappearances. It has expressed concern that such a declaration might have the effect of setting up a standard for the application of the obligation of non-refoulement, which may be inconsistent with the standard provided for in article 16 and has as invited the state party to consider withdrawing its declaration on article 16 of the Convention and recommends that it ensure that, in practice, the

⁵⁹ Concluding Observations for Spain, p. 22, Netherlands p 22-23, Armenia p.16-17, Bolivia p.25, Slovakia p. 15, Peru p. 23

⁶⁰ Concluding Observations for Serbia p.20, Montenegro p 23, Iraq p.27

obligation of non-refoulement is implemented in a manner that is consistent with the standards set in the said provision and that it is the most conducive to protection from enforced disappearance.⁶¹

3. Protection from impunity for the crime of enforced disappearance

(a) Statute of limitation

When enforced disappearances amount to crimes against humanity no statute of limitation can be applied. When enforced disappearance has occurred as an individual act, the regime of the Convention needs to be applied. Under Article 8 “*a State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:*

(a) Is of long duration and is proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.”

In relation to this provision some elements need to be clarified. A state party is not obliged to set the statute of limitation for the crime of enforced disappearance, as the contrary is true, a state party is not obliged under article 8 to not apply a statute of limitation. As the language of this article which starts with “if a state party applies” and taking into account the gravity of the crime, CED has elaborated a position which favorize no statute

⁶¹ Concluding Observations for Germany, p.15

of limitation for the crime of enforced disappearance. This position has come evolving, while it has recognized the non-obligatory nature of Article 8. During its first deliberations it has been strictly reflecting the understanding of the provision that statute of limitation is allowed, but in this case two conditions needs to be fulfilled, first the statute of limitations is of long duration and proportionate to the extreme seriousness of the offence and second that the term of limitation actually commences at the moment when the enforced disappearance ends, i.e., when the person is found alive, his or her remains are found or their identity restored.⁶²

The Committee has been attentive to indicate in concrete cases where it has been concerned that the statute of limitation that would apply to the crime of enforced disappearance may be short, for example the range from 5 to 20 years, have been considered “extremely short”.⁶³

Taking into account the importance of the statute of limitation in preventing the impunity for the crime of enforced disappearance, CED has elaborated on its position by preferring the more advance stance and has invited states parties, when criminalizing enforced disappearance as an autonomous offence and as a crime against humanity, to consider providing that the offence is not subject to a statute of limitations.⁶⁴

⁶² Concluding Observations Spain p.12

⁶³ Concluding Observations for Japan, p. 19

⁶⁴ Concluding Observations for Germany p. 9

(b) Criminal responsibility of superior officials

No order or instruction of a superior can justify the crime of enforced disappearance. The issue of the responsibility of the superiors has been examined regularly by the Committee during the reporting process. It has issued recommendations to the states parties to ensure that criminal legislation incorporates the responsibility of superiors under the terms set out in article 6 (1) (b) of the Convention and expressly prohibits the invocation of the orders or instructions of a superior to justify an offence of enforced disappearance.⁶⁵

Jurisdiction for the crime of enforced disappearances

The regime of jurisdiction in the Convention is based on two principles, universal jurisdiction and *aut dedere aut judicare*.⁶⁶ The Convention provides for the explicit obligation to prosecute the crime of enforced disappearance. It recognizes for the exercise of the universal jurisdiction.⁶⁷

The Committee has examined the possibilities provided in the domestic legislation to exercise the universal jurisdiction for the crime of enforced disappearances and has recommended that the

⁶⁵ Concluding Observations for Mexico, p.22, Iraq 16, Bolivia p; 15, Peru p.17, Colombia p. 18

⁶⁶ Article 11.1 “The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.”

⁶⁷ Article 9.2. “Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized”.

exercise of jurisdiction by the courts over offences of enforced disappearance is fully guaranteed, in accordance with the obligations arising from article 9 of the Convention, in particular the principle of *aut dedere aut judicare* set out in that article.⁶⁸ For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. No conditions which are not provided for in the Convention should affect the exercise of jurisdiction by the domestic courts, in conformity with article 9 of the Convention.⁶⁹ States parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.

(c) Obligation for effective investigations

The Convention puts to the state party the obligation to undertake effective investigations. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities should undertake an investigation, even if there has been no formal complaint on the case. A State party should adopt the necessary measures to ensure that persons suspected of having committed an offence of enforced disappearance are not in a position, directly or indirectly,

⁶⁸ Concluding observations for Germany p. 11, Iraq p.20

⁶⁹ Concluding Observations for Slovakia, p.13

by themselves or through others, to influence the progress of investigations.⁷⁰

The Committee has recommended for the adoption of a legal provisions that expressly establish: (a) the suspension, for the duration of the investigation, of any officials suspected of having committed an offence of enforced disappearance; and (b) a mechanism that ensures that law enforcement or security forces, whether civilian or military, whose members are suspected of having committed an offence of enforced disappearance do not take part in the investigation.⁷¹

4. The rights of the victims of enforced disappearances

(a) The definition of victim

CED has focused a special attention to the review of the concept of the victim in the national legislations, taking into account the importance it plays for the enjoyment of the rights provided in the Convention. The general situation shows that the innovative definition of the victim in the Convention has not been widely reflected in the national legislation, which has been pushing the Committee to raise the issue intensively during the dialogues with the states parties and recommend in every concluding observation the need to provide for the wide definition of victims of enforced disappearances. Restrictive conditions which narrow the definition are strongly discouraged.

⁷⁰ Concluding Observations for Uruguay , para 20

⁷¹ Concluding Observations for Argentina, p. 23, Spain p.18

In the case of one state party the Committee has expressed concern that the criminal law provides that the victim must have suffered direct and personal harm and that the two conditions are more restrictive than that under article 24, paragraph 1, of the Convention, which refers to both the disappeared person and any individual who has suffered harm as the direct result of enforced disappearance.⁷²In another case, the Committee has mentioned not only the national law, but also the European law, which is binding in the state party, facing the definition of the victim in the Convention and failing to comply with it.⁷³

(b) The legal situation of disappeared persons and their relatives

The Convention calls on the states parties to take appropriate measures concerning the legal situation of disappeared persons whose fate remains unclear and their relatives, in particular in areas such as social protection, financial matters, family law and property rights.

In order to adequately address the legal situation of disappeared persons the Committee has invited the state parties to incorporate a declaration of absence as a result of enforced disappearance. The declaration of absence by reason of enforced disappearance is a document which can adequately address the legal situation of disappeared persons and that of their relatives in areas such as social welfare, financial matters, family law and property rights. Usually the states parties argue that they can issue a declaration of absence to address the legal situation of the

⁷² Concluding Observations for France, p. 34

⁷³ Concluding Observations for the Netherlands, p.32.

disappeared person. CED considers that a declaration of absence with presumption of death as a means of establishing the legal situation of persons who have disappeared does not adequately reflect the complexity of the phenomenon of enforced disappearance. In particular, and in view of the continuous nature of enforced disappearance, it considers that, in principle and unless there is evidence to the contrary, there is no reason to presume that a disappeared person has died so long as his or her fate has not been determined.⁷⁴

(c) The right to truth

The right to the truth has gained the status of an autonomous, inalienable and independent right in international law. The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or born during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim.⁷⁵ At the international level, the right to the truth relating to enforced disappearances or missing persons is recognized in a number of instruments. The existence of the right to the truth as an autonomous right was

⁷⁴Concluding Observations for Germany, p. 27

⁷⁵ Report of the Office of the United Nations High Commissioner for Human Rights. Study on the right to the truth, U.N. Doc. E/CN.4/2006/91 of 9 January 2006, p 57 - 59.

acknowledged by the Working Group on Enforced or Involuntary Disappearances (WGEID) in its very first report.⁷⁶ The right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society as a “vital safeguard against the recurrence of violations”.⁷⁷ The Committee has stated that the State’s domestic law must incorporate provisions that enshrine and protect the right to the truth.⁷⁸

(d) The right to reparation

The right to reparations is a well-established and basic human right, which is enshrined in universal and regional human rights treaties. The victims of enforced disappearance have the right to reparation, which corresponds to the obligation of the state party to make reparation. The Convention is the only treaty in the system which codifies precisely the Joinet principles to combat impunity and the Van Boven principles on reparations.

Under the Convention, each state party should guarantee, in its legal system, to the victim of enforced disappearance the right to obtain reparation and to be compensated quickly, fairly and adequately. This right covers material and moral damage as well as, where appropriate, other forms of reparation, such as

⁷⁶ Report of the Working Group on Enforced or Involuntary Disappearance, A/HRC/16/48

⁷⁷ General Comment on the right to truth in relation to enforced disappearance, at https://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf

⁷⁸ Concluding observations for Argentina, p 35; France p 3- 35

restitution, rehabilitation, satisfaction "including the restoration of dignity and reputation" and finally guarantees of non-repetition. WGEID has stated that reparation must not be contingent on the determination of responsibility and criminal conviction of the perpetrators and other participants in the case of enforced disappearance.⁷⁹ CED has urged States to guarantee the right to compensation for the relatives, regardless of whether the crime of enforced disappearance is criminally prosecuted.⁸⁰

5. The protection of special categories: Women, children, migrants

CED has put a particular attention to the situation of special categories, by underling the particularly cruel effect of enforced disappearance on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender-based violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisal as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves were subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially vulnerable to numerous human rights violations, including identity substitution.

⁷⁹ Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/22/45

⁸⁰ Concluding observations for Spain, p. 30, for Serbia . 26.

Women are explicitly referred to in the Convention on enforced disappearances only once in Article 7 in references to a special category: pregnant women. The CED is a rare example of mention for the women as a special category for protection in cases of enforced disappearances. International humanitarian law offers a special protection for this category.⁸¹

The Convention sets forth a comprehensive regulation of the wrongful removal of children.. Article 25 which stipulate specific obligations in respect of children, constitutes an important new element of the Convention.⁸² It provides special protection to three categories of children, those who are subject to enforced disappearance, whose father, mother or legal guardian is subjected to enforced disappearance and the children born during the captivity of a mother subjected to enforced disappearance. Under this article state parties are obligated not only to codify in their criminal law an offence of enforced disappearance, but also to have a separate provision on punishment of the wrongful removal of the children and the falsification and destructions of their documents. Article 25/4 recognizes the right of children of disappeared parents to preserve or to have reestablished their identity including their nationality, name and family relations as recognized by law. Provisions on the protection of children victims of enforced disappearance are guided by the best interest of the child with due respect for the right of a child to express freely its view regarding this issue.

The phenomenon of enforced disappearance of migrants is a modern-day reality, which should not be ignored or underestimated. The increasingly precarious movements of

⁸¹ Protocol I of the Geneva Convention stipulates that "*maternity cases and pregnant women, who refrain from any act of hostility, shall enjoy the same general protection as that accorded to the sick and wounded*" (Art. 8).

⁸² Novak Manfred, '*Torture and enforced disappearance, International Protection of Human Rights: A textbook*', Abo Akademi University, 2009, p. 182

migrants, including through long and perilous journeys associated, among other things, with the often increasingly rigid migratory policies of states focused on deterrence, have created a situation which exposes migrants to heightened risks of becoming victims of human rights violations, including enforced disappearances. WGIED has stated that there is a direct link between migration and enforced disappearances. This is “either because individuals leave their country as a consequence of a threat or risk of being subjected to enforced disappearances there or because they disappear during their journey or in the country of destination.”⁸³

The Committee has touched on this issue during the review of states parties where this situation is present. It has also addressed it in the guiding principles for the search for disappeared persons, where in principle 9 it states that the search should take into account the particular vulnerability of migrants. States should pay attention to the risks of enforced disappearance, which increase as a result of migration, especially in contexts of trafficking in persons, sexual slavery and forced labour. The states concerned should develop cooperation agreements and establish competent authorities to allow for effective coordination in the search for disappeared persons at each stage of migration. Cooperation between search authorities in countries of origin, transit and destination should ensure the rapid and secure exchange of information and documentation that may help to locate disappeared persons in the country of transit or destination. In full compliance with international standards on non-refoulement, states should ensure that the registration of migrants at border

⁸³ Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration, A/HRC/36/39/Add.2

controls involves the individual examination of all applications for entry so as to allow for an effective search in the event of a person's disappearance.⁸⁴

3. Legal and Procedural Challenges for the Next Decade

(a) Universal ratification

As a lot of progress can be mentioned, it is true that some challenges continue to persist. One of the most important not only for the work of CED but also for the international community remains the goal of universal ratification, which is critical to making the Convention fully operational.

As of September 2020, there are 63 States Parties and 98 signatory States to the International Convention for the Protection of All Persons from Enforced Disappearance. The pace of ratifications remains low, and compared with the same generation instruments is not promising. A glance at the geographic spread of the current States parties to the Convention already gives a clear indication of the regions which are seriously underrepresented. Within each region it is useful to engage with those States that have already signed the Convention to encourage the ratification. The ratification campaigns have not been particularly successful, there is need for reflection to surpass the challenges linked with the difficult nature of the phenomenon.

⁸⁴ Guiding principles for the search for disappeared persons, CED/C/7

(b) Acceptance of the competence of the Committee on article 31

Another obstacle in the activity of CED has been encountered by the low number of acceptance of the competence of the Committee to receive individual communications under Article 31 of the Convention. At present, only 24 of the 63 states parties have done so, less than half of the States Parties, which is a clear sign of reluctance to recognize this competence.

A particular importance in relation to this procedure has been put by CED to states parties where the situation of enforced disappearances is particularly worrisome. The case of Mexico is significative, while for a long time it opposed, in principle, to recognizing the competence of the organs of human rights treaties to receive inter-State complaints, given that these complaints tend to be politicized.⁸⁵ Recently, the unanimous decision by the Mexican Senate to recognize the competence of the CED to examine individual complaints has been welcomed as a significant step in the country's human rights development.⁸⁶ When this procedure will enter into force, it will be interesting to follow the fulfilment of the expectation for an overwhelming flow of individual communications coming from this state party.

(c) Visits

By virtue of article 33 of the Convention, the Committee is empowered to receive information concerning allegations that a

⁸⁵ Report of Secretary General to the General Assembly, A/72/280, p 9

⁸⁶ Enforced disappearances: UN Committee welcomes Mexico's decision on individual complaints

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26209&LangID=E>

State party is seriously violating the Convention and request, if it is satisfied that the information received is reliable, one or more of its members to undertake a visit to the State party concerned and report back without delay. CED has considered that the conditions to conduct a visit are fulfilled in the case of Mexico and has started a communication with the state party in May 2013, followed by systematic reminders. On 17 May 2018, the state indicated to CED in a written submission that it was not in a position to accept the request of the Committee to undertake a visit to the State party. However, it expressed its willingness and commitment to continue the cooperation and dialogue with the Committee.⁸⁷

(d) Overdue reports

As a new treaty body, CED has not experienced backlog, but it is trying to deal with a number of overdue State Party reports. It has discussed a strategy to elicit the submission of overdue reports and took a decision to consider the possibility of examining States parties in the absence of a report in cases where the report had been overdue for more than five years.

The Committee may also notify the defaulting State party that it intends, on a specified date, to examine in public session the measures taken by the State party to implement its obligations under the Convention, in the absence of a report. In the letter notifying the state party of its intention to carry out a review in the absence of the report, the Committee may also include a list of issues on which the Committee may wish to focus the review of the report. In this letter, the Committee will also invite the state

⁸⁷ Report 13-14 para 62

party concerned to send a delegation to participate during the review. If the state party is not represented, the Committee may decide to proceed with the review, or it may notify the state party of a new date for consideration. The Committee will transmit the adopted Concluding Observations to the state party concerned. The methods of work have been adopted accordingly to this procedure and the Committee decided to put it into place with the first countries, but due to shortages in human resources in the secretariat, the Committee decided to postpone the adoption of a list of issues in the absence of the report of Nigeria to a later date.⁸⁸

(e) Mechanism under article 34 of the Convention to address widespread or systematic enforced disappearances

Pursuant to article 34 of the Convention, CED is empowered to receive and consider information which appears to it to contain well-founded indications that enforced disappearance is being practiced on a widespread or systematic basis in the territory under the jurisdiction of a state party and may, after seeking relevant information from the state party concerned on the situation, urgently bring the matter to the attention of the General Assembly.

CED needs to reflect on the conditions to put into motion this important mechanism which has not been yet used in practice.

⁸⁸ Report of the Committee on Enforced Disappearances 15-16 sessions, A/74/56

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=A%2f74%2f56&Lang=en

(f) Education and training

As the Convention is still considered as a new instrument and its complexity is recognized, there is a need to raise awareness generally and to train specifically those with the obligation to respect and implement its provisions. The issue of the training has been raised almost in all concluding observations issued by CED. It has recommended that the state party should ensure that all state officials, including judges and prosecutors, receive appropriate and specific training on the Convention and the obligations incumbent on states that have ratified it.⁸⁹

(g) General Comments

General Comments are commonly used among the treaty body system as a way to publishes its interpretation of the provisions of its respective treaty. During the first years of activities CED has not used this practice, but has not excluded the possibility of doing it in the near future. It has already identified some topics that may be the subject of its first general comments, based on the thematic discussions it has developed through the years.

⁸⁹Concluding Observations for Uruguay, p 14, Argentina p. 33, Netherlands 31, Germany p. 23 Belgium p.26 Serbia, p. 22 Mexico, p.37, Montenegro p .27 Bolivia p.31 Slovakia p. 23, Italy p. 31, Japan p.38

(h) Responsibility for enforced disappearances committed by non-state actors

The definition of enforced disappearance in article 2 of the Convention requires that it is carried out by agents of the state, persons or groups acting with the authorization, support or acquiescence of the state. However it is acknowledged that acts of enforced disappearances can be committed by non-state actors, recognizing also the responsibility of the state party to take appropriate measures to investigate acts and taking those responsible to justice. The responsibility of the state is in criminalizing these acts committed by private actors in domestic level. The Committee has taken into account the position of various States parties regarding urgent actions in which the alleged acts cannot be clearly attributed to persons acting with the authorization, support or acquiescence of the State. In that regard, the Committee reiterates its position that States parties must carry out an exhaustive investigation of the events based on all existing scenarios, including that they correspond to enforced disappearance. In one concluding observation the Committee has mentioned the fact that the definition refers to acts carried out by “public officials or public servants”, not “agents of the State”, the language used in article 2 of the Convention. The Committee considers, however, that one of the essential elements of the definition of enforced disappearance contained in article 2 of the Convention is precisely the direct or indirect involvement of State agents in the criminal conduct in question that distinguishes it from other similar conduct, as may be inferred from a joint reading of articles 2 and 3. The Committee considers that the inclusion of non- State actors in the definition of the crime of enforced disappearance dilutes the accountability of the State and

that the broad definition of enforced disappearance contained in article 165 of the Criminal Code could have other types of consequences, such as a lack of clear statistics or inadequacies in searches for disappeared persons and in criminal investigations, as these require differentiated approaches and strategies.⁹⁰

(i) Amnesty, pardon and immunity

There are no references to amnesty and pardons in the Convention, due to the negotiating process, there is a lacuna in the text of the Convention. The Committee started to form a position on this regard, by amnesty and pardons for the crime of enforced disappearance should be excluded in the national legislation. It has stated that troubling is the fact that enforced disappearance is not among the offences for which pardons may not be granted.⁹¹ CED has recommended that the State party repeal any provision that may have the effect of exempting perpetrators of enforced disappearance from any criminal proceedings or sanction against them. It recommends in particular that the State party take the legislative measures necessary to remove the possibility of granting amnesty for international crimes, including enforced disappearance; and ensure that plea agreements and other avenues used to clarify cases of enforced disappearance or identify the perpetrators of an enforced disappearance do not hinder victims' access to justice and lead to impunity.⁹²

⁹⁰Concluding Observations for Colombia p. 15

⁹¹ Concluding Observations for Peru, p.14

⁹² Concluding Observations for Bosnia and Hercegovina, p. 26

Conclusions

The Convention for the Protection of all Persons from Enforced Disappearance has brought an added value to the international human rights system. Its adoption is in itself the message, suffice it to say all the progress that was made to move from a “*prise de conscience*” to a declaratory statement, and from a soft law instrument to a full legal engagement. Its entry into force is the most important step, constituting a unique and irreplaceable instrument in the struggle against enforced disappearances. At the crossroads of international law of human rights and international criminal law, the Convention is among the most forceful human rights convention ever adopted by the United Nations. Even though some States are not nowadays exposed to the problem or believe they are not at risk, the ratification of this universal instrument is particularly for its preventive effect. The Convention provides a strong foundation for meeting new challenges, that is why it is vital to continue to work towards its universalization and full implementation. The Committee on Enforced Disappearances remains a key tool in reaching this objective. During its 9 years of activity CED as the “youngest” committee caught up with other treaty bodies not only by creating its “working infrastructure”, but also exercising to practice the tools available in the Convention, starting to develop a vigorous jurisprudence and built up a solid practice of guiding states and protecting victims. It can be said that this first cycle of the activity of the Committee has been crucial for consolidating its mandate as ‘the legal guardian’ of the Convention, by building on its independence, competence and achievements with the aim of providing leadership in the fight against enforced disappearance. The Committee has a huge responsibility to deliver as its activity

is linked with one of the toughest areas of human rights work, experiencing the cruelty of the crime of enforced disappearance and the anguish for people to have no closure and no possibility of understanding what had happened to their loved ones. Its vision for the future should be ambitious and forward-looking, by consolidating the existing tools such as urgent actions, a life-saving instrument at the core of the Convention and putting to practice the full range of the provisions to achieve the objective of the Convention to protect all persons from enforced disappearances.