COMPETENCES AND FUNCTIONNING
OF THE COMMITTEE ON ENFORCED DISAPPEARANCES
by Emmanuel DECAUX,
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I am very honored to participate in this important conference in Berlin – actually the first one and a very useful precedent – which is a privileged opportunity to foster the International Convention for the protection of all persons from enforced disappearance. I welcome the initiative of the organizers and especially the role of my dear colleague and friend, Rainer Huhle, who sits on the new Committee on enforced disappearances (CED). I want also to salute the pro-active contribution of the German Institute for Human Rights, a great partner in the European network of National Institutions.

The mandate of the CED compels us. We are aware of the human tragedy that is the “phenomenon” of enforced disappearances, a crime of extreme seriousness, destroying victims by denying their mere existence and abolishing the rule of law. 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 Committee's mandate is the result of a long-term process. The first resolution of the UN General Assembly was adopted on December 20, 1978, followed by the setting of the Working group on enforced and involuntary disappearances by the Human Rights Commission, two years later, in 1980. The Declaration on the protection of all persons from enforced disappearance was adopted by the General Assembly, on December 18, 1992, twenty years ago. 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. The Convention was adopted on December 20, 2006, following intense negotiations and entered into force on December 23, 2010.

Following that turning-point, elections were held within six months, to designate the 10 independent experts appointed to serve as members of the Committee on Enforced Disappearance. The experts are elected for a term of four years renewable once, but in a conventional manner, half of the first mandates were reduced to two years, to allow a gradual renewal of the Committee. In a more original way, Article 27 of the Convention provides an "evaluation of the functioning of the Committee" by the Conference of States Parties, at a term of 4 to 6 years after the entry into force, which is a compromise during the negotiation, making possible all options. This means that the Committee will have to prove itself, without delay, as its members are determined to.

Our first session was held in November 2011 and the second one in March 2012. They were technical sessions, very short, about one week – respectively four days and five days –, but we wanted from the outset to make the Convention “operational”. Our next sessions, from the
third one in November 2012, will last ten days, and we will allow in a first step concrete situations regarding the States Parties. Two ten-day sessions are also scheduled in 2013, but we probably would have to anticipate an expansion of the sessions of the Committee to meet its various missions.

The Committee's mandate should also be considered in a perspective of space. The Convention has a universal dimension and is part of the "core instruments" put forward by the High Commissioner for Human Rights. Contrary to the Declaration of 1992 for which the Working Group on enforced and involuntary disappearances is the caretaker and which involves all UN Member States, the Convention of 2006 is binding only on States parties. It entered into force following the 20th ratification and currently counts 32 States Parties, with some sixty signatory states. All States parties have not accepted the voluntary mechanisms, such as individual communications procedure under Article 31 or the state communication procedure of Article 32, which limits the practical scope of their commitment.

But the objective is the universal and effective implementation of the Convention by all States. It will close the gap of protection for victims, when the Rome Statute of the International Criminal Court deals only with repression of “widespread or systematic practice of enforced disappearance” as crime against humanity. We need multilevel prevention and international cooperation, repression of the crime as such, justice and reparation. This is a worthy challenge responding to the responsibility of all stakeholders, to address the ordeal, the efforts and expectations of several generations.

In a sense, the Committee is just one link in a long chain of solidarity launched more than 30 years ago, by a coalition of States and NGOs who created a diplomatic dynamics and a legal framework. We affirm our humility and our commitment, our eagerness and our dedication to fulfill our mandate. During the first session of the Committee, its new members undertook the solemn commitment to exercise their duties and responsibilities in full conscience, independence and impartiality. However, impartiality is not indifference or neutrality. In cooperation with all States parties, our protection mandate has to be "victim-oriented" in the words used by the Human Rights Council about the complaint procedure.

Our mission is to implement the potentialities of the Convention, its technical innovations as well as its constructive compromises, to make it a major tool for the protection and promotion of human rights. In this respect, we are at a turning point in the functioning of the Committee.

I – STANDARD-SETTING OF THE PROCEDURES OF THE COMMITTEE

Firstly, the Committee has to develop its working tools. It has to determine its organs, with the appointment of a chairman and a bureau, for two years. The size of the Committee facilitates a collegial spirit and a close consultation. It should be noted the involvement of each member in the collective work, with shared responsibilities for preparing non-papers and documents. A key link was also the appointment on the eve of the second session, of the
secretary of the Committee - a United Nations official uniquely qualified for this position – who completed our team and multiplied our capacity for work.

I will not insist on these practical elements, but they are crucial to allow fruitful exchanges in a multicultural context, between the very different personalities that do not know each other, do not speak the same language, from around the world with contrasting historical experiences, and required to work all together for a common ideal. This implies not only a complete involvement during the brief sessions, but a continuous and heavy work between the sessions, using internet. The Committee is not a sinecure, it reflects a substantive commitment of all its members.

1. The first task of the Committee was to adopt provisional rules of procedure in order to work in transparency from the first session. This regulation was written in English and was revised during the second session. Its different language versions are being translated. If a technical basis was prepared by the Secretariat, it was still necessary to adapt it to the requirements and specificities of the Convention, leaving some flexibility for later adjustments in the light of practical experience or review of the stakeholders. We have now our rules of procedure and the Committee is fully operational, “en ordre de marche”.

2. At another technical level, the second session was dedicated to the declination of the rules of procedures in practical tools, to guide the implementation of the Convention. This was the case for three or four documents due to be posted on the Committee website as soon as possible:

- The guidelines regarding the submission of state reports under article 29 of the Convention were written in a practical concern. This was to facilitate the work of States parties that shall, within two years after the entry into force, present the measures taken to give effect to their obligations. This also shall lead to a systematic approach of the Convention, although the States may find themselves in very different situations.

The Convention does not explicitly provide periodic reports with specific deadlines, but leaves the door open for a more flexible monitoring, with the examination of "additional information on the implementation of the Convention". The implementation of this first reporting cycle on time becomes even more important that an effort of rationalization was initiated by the High Commissioner, with the Dublin II process to which the Committee is party since its last session, following the accession made personally by its president following the first session.

- The form for individual communications on the basis of Article 31 was based on the precedents used by other treaty bodies. A detailed notice must enable the applicant to submit all relevant information, for the Committee to effectively decide on the admissibility criteria and refer the file to the State concerned before consideration of the substance, according to a contradictory procedure which remains written.
The Committee is particularly attached to the guarantees of confidentiality, in the very specific context of enforced disappearances, as well as to the interim measures and measures of protection for complainants, families and witnesses. The dispatching of cases between the Committee and other individual communication procedures is a key issue for the future of this mechanism. Depending on the volume of cases, the Committee may set up special bodies, working group or rapporteur, outside of its plenary meetings.

- It will also be needed, at least formally, to develop mutatis mutandis a form for the state communications under Article 32.

- The simplified form for a request for urgent action, under Article 30, has been a priority, because of the originality of this procedure which concern all States Parties. Much attention has been paid to the notion of "legitimate interest" to seize the Committee and on the delays of responsiveness that such a procedure implies. The Committee appointed a rapporteur among its members, an assistant rapporteur and an alternate, to be able to respond promptly to any request for urgent action.

The admissibility conditions are the absence of a parallel application "being examined under another procedure before an international investigation or settlement of a same nature". Taking into account, the unique nature of the competence of the CED, with its capacity to “request that the State Party should take all the necessary measures, including interim measures”, there is room for further interpretation. But the applicants shall be fully informed of the different options offered by the Working group and the Committee, to choose via electa with full knowledge of the possibilities.

3. At a third level, it is imperative to translate these technical documents in communication tools. This involves the publication by the High Commissioner of a new revised fact-sheet on Enforced and involuntary disappearances (n°6/rev.3), taking into account the entry into force of the Convention and the establishment of the Committee.

This implies above all a more user-friendly access to the United Nations website, to make appear clearly and simply to the general public, alternative procedures available: On the one hand the system of “individual petitions”, for which the remedies of the Human Rights Committee, or of the Committee against torture, and of the Committee on Enforced Disappearances shall be articulated; on the other hand the system of urgent appeals for which the respective responsibilities of the Working group on enforced and involuntary disappearances and those of the Committee on enforced disappearances shall be distinguished.

This to guarantee the effective access of the victims to the new procedures implemented. The Convention promotes formation and training for “law enforcement personnel, civil or military, medical personnel, public officials, etc” (art.23) and encourage the action of NGOs, but the treaty is a complex and sophisticated instrument, which need important efforts of communication and awareness from the OHCHR, as for States Parties.
II – CONSULTATION OF THE COMMITTEE WITH THE STAKEHOLDERS.

Since its early sessions, the Committee showed its will to carry out a consultation with all stakeholders, starting with the States, but also with NGOs and associations of victims.

1. A strategy of ratification is needed for the signatory States as well as for the third States. A forthcoming international conference in Paris on May 15, sponsored by France and Argentina, should restart this dynamic, by mobilizing all the States “friends of the Convention” and the coalition of NGOs. This is a priority to reach a critical mass quickly to give the Convention full effect.

This concerns all States and all continents. It would be an error for the old democracies to consider that enforced disappearances take place only under "dictatorship". Citizens of old democracies can become victims of enforced disappearance in third countries, and persons under their domestic jurisdiction can become victims, with or without the complicity of State agents. The fight against terrorism was a recent illustration of the risk of a legal no man’s land, une "zone de non-droit”, in the heart of Europe, with the “spider’s web” of clandestine transfers and secret detentions, described in 2006 by senator Dick Marty, in his report to the Parliamentary Assembly of the Council of Europe (Report n°10957). The “Joint study on global practices in relation to secret detention in the context of countering terrorism” (A/HRC/13/42) published in 2010 by the WGEID and several other thematic mandates, Such as Martin Scheinin and Manfred Nowak, is a more recent illustration of this concern. The Convention is not only a moral pulpit for leading by example, it is also a practical risk-assurance for democracies, as for every State Party.

The commitment of all is necessary for an effective international cooperation in a universal context. In this respect the recent recommendation 1868 and resolution 1995 adopted in March 9 2012 by the Standing Committee of the PACE, following a report of MP Pourgourides (Report n°12880), to “consider launching the process of drawing up an European convention for the protection of all persons from enforced disappearance, based on the achievements of the UN Convention” (res. §.9.3) seems irrelevant, I’m sorry to have to say it so bluntly. This initiative, launched by some members of Parliament, with a narrow agenda and without proper consultation, is doomed from the start because of obvious contradictions between Members States of the Council of Europe.

It risk meanwhile to create a diversion and to demobilize the necessary efforts in a broader international context, whereas “The Assembly reiterates its support for the United Nations International Convention for the Protection of all Persons from Enforced Disappearances and invites the Committee of Ministers to urge all the Council of Europe member States which have not yet done so to sign, ratify and implement this convention” (rec. §.2). But this welcomed priority is undermined when “the Assembly nevertheless recalls that the United Nations Convention notably: 3.1. fails to fully include in the definition of enforced disappearances the responsibility of non-State actors; 3.2. remains silent on the need to establish a subjective element (intent) as part of the crime of enforced disappearance; 3.3.
refrains from placing limits on amnesties or jurisdictional and other immunities; 3.4. severely limits the temporal jurisdiction of the Committee on Enforced Disappearances” (rec. §.3). At the very least, a moratorium to assess the scope and effectiveness of the UN Convention would be necessary before criticizing the assessment of the Working Group or to list the so-called weaknesses of the new instrument, “recognising that the UN Convention is necessarily a compromise” ! It is not the moment or the place to argue with these innuendos, but the interpretation and implementation of the Convention by the Committee will be equal to the occasion, without watering down international obligations. The Committee sticks to the “objective” elements of the definition of the crime in the Declaration and in the Convention. It would look closely at the opportunity and feasibility to take in account the “responsibility of non-State actors”, in the legal parameters of Articles 3 and 4, but also of Articles 24 and 25, for example, keeping in mind the primary responsibility of States, according to Public International Law. The first general debate of the Committee, during its third session next November, will deal with the issue of “State responsibility and role of non-State actors”.

It would be more urgent to facilitate the implementation of the Convention, at domestic level or at European level, by developing a model law if not, at least “good practices” adapted to different legal systems to take into account the many obligations of the States parties, not only in criminal but also in civil matters. Thus, the bill of adaptation recently introduced by the French Government in the Senate (Sénat, Pj. N° 250, 2011-2012) is a first step to articulate the obligations of the Rome Statute and of the Convention. As the Prime Minister said in the « exposé des motifs » : « Contrairement aux décision-cadres et à la décision Eurojust, la Convention sur les disparitions forcées n’offre aucune « option » aux Etats qui sont parties à cette convention. Les Etats qui ont ratifié la Convention ont l’obligation d’incriminer les disparitions forcées. C’est ainsi que l’article 6 du projet de loi intègre en droit français la définition des disparitions forcées d’une manière strictement conforme aux obligations résultant de la Convention et tire toutes les conséquences prévues par la Convention (délai de prescription de l’action publique et de la peine adapté à la gravité des faits, introduction d’une clause de compétence universelle, rédaction plus large de la clause aut dedere, aut judicare » (Pj n°250, p.28).

The WGEID made an excellent work, with its study on “Best practices on enforced disappearances in domestic criminal legislation” (A/HRC/16/48/Add.3) published in December 2010, but we need to up-date this inventory, in the light of the entry into force of our Convention and of new domestic developments. This effort of information and awareness on the legal framework of the Convention is all the more necessary that it is a complex instrument that requires a practical translation for the States concerned. Regional efforts, first of all, for European countries, within the European Union, the Council of Europe or – why not – the OSCE, for example, would be very helpful. But the same efforts would be endeavoured for Africa, America, and Asia, and within the Commonwealth and the Francophonie, etc. The next cycle of the UPR will constitute a great opportunity for friends of the Convention to advocate for signature and ratification of the treaty, but they ought also to use every ways and means to facilitate action-oriented cooperation in practical terms.
2. The broad consultation also concerns NGOs and associations of victims. The Committee participated in its first session in a side-event organized by the coalition of associations of families of missing persons and has been always ready to listen to NGOs such as Amnesty International who published in 2011 a useful “Checklist for effective implementation of the Convention”, under the title No impunity for Enforced Disappearances, 2011).

The Committee wishes to develop exchanges and to practice more openness with regard to these key partners and transparency compatible with all requirements of confidentiality. The Committee recognizes that grassroots NGOs are sources of first hand information, as well as Human Rights National Institutions. It will consider the practicalities of the presentation of alternative or shadow reports, under Article 29, but also of amicus curiae, for its quasi-litigation procedures, such as Article 31.

A new field to explore is the various "information" that will allow the committee to implement the unparalleled competences under Articles 33 and 34. Article 33 provides for the possibility of a field mission when "the Committee is informed by reliable information, that a State party is seriously violating the provisions of the Convention". And Article 34 provides an additional step, with the possibility of "bringing the matter on an urgent basis to the attention of the UN General Assembly". The articulation between the different competences of the Committee shall be specified, by defining different parameters and objective criteria, even before a crisis arises, but obviously the quality of information provided by NGOs will be a key element in the proper functioning of these new provisions.

3. Article 28 of the Convention emphasizes the cooperation with all international institutions and organizations. This is particularly the case of UNHCR, ICRC or UNICEF with whom initial contact has been established. It will be the same with the other treaty bodies, particularly in the context of the inter-committee coordination and the monitoring of Dublin II, to streamline processes and procedures while safeguarding the innovations that make the added value of the Convention on enforced disappearances.

But clearly the natural partner of the Committee is the Working Group on Enforced and Involuntary Disappearances. The first official meeting, bringing together the fifteen experts was held in November 2011 with the publication of a press release confirming the principle of annual meetings. At another level, the resolution of the General Assembly on enforced disappearances calls on the President of the Committee and the Chair-Rapporteur of WGEID to come to New York to present their activity reports. Both bodies have reiterated that their roles were complementary, the Committee acting within the scope of the Convention which he is the guardian, on the basis of legal obligations assumed by States parties for the future, while the competence of the Working group concerns all member States, in a humanitarian context reinforced by the Declaration of 1992. But beyond these technical differences, the two bodies share responsibility for legal consistency in defining the very concept of "enforced disappearances" and the effective implementation of various procedures, which involves close consultation, whether regarding general observations being developed by the working group or its program of visits.
For its part, the Committee intends to focus on practical experience, with an operational interpretation of the autonomous concepts of the Convention, when examining reports and communications, before undertaking the drafting of general comments. At this stage, the Committee has launched several own reflections on women and children as vulnerable groups, but also on the issue of non-state actors. In light of the elliptical provisions of Article 4, it wants to deepen its reflection on "the responsibility of the State and the role of non-state actors", by organizing a first day of general discussion on this topic, during its third session in November 2012.

III – IMPLEMENTATION OF THE PROCEDURES OF THE COMMITTEE

It would be necessary to write a third part of this presentation on the implementation of the competences of the Committee, but it would be premature. The Committee is less than one year of existence. It is very vigilant about crisis situations which could result in a rapid alert, because things change quickly, just think about the chaotic situation in Mali, one of the first States Parties. But for now its role has been to set up tools and to deal with procedural issues, sometimes legal niceties, even if the stakes were essential.

It is now necessary that States Parties present their first reports “within two years”, while a delay from their part would be inexcusable, after two years of running since the entry into force of the Convention in December 23, 2010. In a letter to States, in my capacity of chairman of the CED, I welcomed there cooperation and reminded them of this time frame. I hope that the first reports will be discussed at the November session, even if technical delays of translation and editing involve a shift of 12 weeks. In any case, the two sessions of 2013 will mark a first appointment of each the States Parties to make a public assessment of its commitments, un “bilan de santé”, a sort of check up.

Convention provides an all-risks insurance for the future, with a range of means of prevention, monitoring and rapid alert. It offers a series of practices guarantees and political principles with regard to truth, justice and reparation. It fills a gap by listing measures of protection and cooperation, domestically and internationally, while paving the way for a specific criminal offense, including the possibility of qualification as a crime against humanity. The Convention is at the crossroads of international law of human rights and international criminal law, constituting a unique and irreplaceable instrument. As the crime of enforced disappearance constitutes a denial of the victim, through the denial of the "protection of the law", the answer which shall be given is the affirmation of the law, with a continuous vigilance against any breaches. Each of us has the common responsibility to give its full scope to the Convention. We have no time to wait and see, we are eager to build a momentum for universal ratification and effective implementation. According to the compelling wisdom of Hillel the Elder: “ If I’m not for myself, who will be for me? And when I’m for myself, who am I? And if not now, when?” The entry into force of the Convention is a new start, but not another story…