

INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

ABSTRACT

Adoption of the International Convention for the Protection of All Persons from Enforced Disappearance represents victory of a decade long initiative to fight the impunity for this hideous crime. The author presents the Convention and analyses some troubling issues which may undermine the overwhelming optimism about its adoption. First part of the article introduces the problem of enforced disappearance. Insight into the history of the legal regulation of the problem has been given in the second part. Third part presents key segments of the Convention, while final, fourth part, shed some light on the perspectives of the implementation of the Convention.

Key words: enforced disappearance, human rights, International Convention for the Protection of All Persons from Enforced Disappearance, Committee on Enforced Disappearance

THE PROBLEM OF ENFORCED DISAPPEARANCE

International Convention for the Protection of All Persons from Enforced Disappearance introduced new human right into the sphere of international law – *right of any person not to be subjected to enforced disappearance*.² Although the right is new, the practice of enforced disappearances is not.

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2 *See:* Preamble, International Convention for the Protection of All Persons from Enforced Disappearance, (further *the Convention*), Internet: <http://www2.ohchr.org/english/law/pdf/disappearance-convention.pdf> 30/10/2008.

History of the crime of enforced disappearance

Practice of the enforced disappearances can be linked back to notorious 1941 *Nacht und Nebel Erlass* (eng. *Night and Fog Decree*). This act, as its name implies, introduced enforced disappearance as a measure against the population of the occupied territories and was justified by the reasons of security of Third Reich or occupying forces. In December 1941 the authorities proclaimed following statement: “Within the occupied territories, communistic elements and other circles hostile to Germany have increased their efforts against the German State and the occupying powers since the Russian campaign started. The amount and the danger of these machinations oblige us to take severe measures as a deterrent. First of all the following directives are to be applied:

I. Within the occupied territories, the adequate punishment for offences committed against the German State or the occupying power which endangers their security or a state of readiness is on principle the death penalty.

II. The offences listed in paragraph I as a rule are to be dealt with in the occupied countries only if it is probable that sentence of death will be passed upon the offender, at least the principal offender, and if the trial and the execution can be completed in a very short time. Otherwise the offenders, at least the principal offenders, are to be taken to Germany.

III. Prisoners taken to Germany are subjected to military procedure only if particular military interests require this. In case German or foreign authorities inquire about such prisoners, they are to be told that they were arrested, but that the proceedings do not allow any further information.

IV. The Commanders in the occupied territories and the Court authorities within the framework of their jurisdiction are personally responsible for the observance of this decree.

V. The Chief of the High Command of the Armed Forces determines in which occupied territories this decree is to be applied. He is authorized to explain and to issue executive orders and supplements.”³ Soon after, persons were arrested by the Gestapo or other units and secretly transported to Germany and information about their whereabouts was not given.⁴ However, the end of World War II was not the end of practice of enforced disappearances.

3 Nazi Conspiracy and Aggression, Vol. 7, Document No. L – 90, Internet: <http://www.avalon.law.yale.edu/imt/1-90.asp> 30/10/2008.

4 Field Marshall Keitel issued the following order to enforce *Nacht und Nebel Erlass*: “Effective and lasting intimidation can only be achieved either by capital punishment or by measures which leave the relatives and the population in the dark about the fate of the culprit.

Regimes in Haiti, Brazil and Guatemala in the 1960s were using enforced disappearance as an “instrument to control society at large and repress all political opposition”.⁵ In Asia, from the 1970s enforced disappearances were practiced in Philippines, Sri Lanka, India, Nepal, Pakistan, Indonesia, Thailand, China, Myanmar, North and South Korea and in Afghanistan.⁶ Latin America experienced systematic practice of enforced disappearances in 1970s and 80s. Argentina, El Salvador, Chile and Guatemala were most notorious by *desaparición forzada*.⁷ Bolivia, Brazil, Colombia, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela also have a history of enforced disappearances.⁸

North Africa and Middle East suffered mostly in 80s and 90s (Iran, Iraq, Algeria, Morocco, Egypt, Turkey, Saudi Arabia, Yemen, Jordan, Lebanon, Syria and Israel).⁹ Although in Sub-Saharan region people are victims of

Deportation to Germany serves this purpose.” Nuremberg Trial Proceedings Vol. 6, para. 181, Internet: <http://www.avalon.law.yale.edu/imt/01-25-46.asp> 30/10/2008 (emphasis added).

- 5 An Vranckx, A long road towards universal protection against enforced disappearance, 2007, p. 4, Internet: <http://www.ipisresearch.be/download.php?id=152> 30/10/2008.
- 6 UN Working Group on Enforced and Involuntary Disappearances (UNWGEID) has expressed its concern about growing number of cases of enforced disappearances in Pakistan, Philippines, Sri Lanka and Thailand. Statement by UNWGEID on the Occasion of the International Day of Disappeared, 28 August 2008, Internet: <http://www2.ohchr.org/english/issues/disappear/index.htm> 30/10/2008.
- 7 Most cases of enforced disappearances in Argentina occurred under military junta. It is estimated that over 30000 people disappeared. See: An Vranckx, A long road towards universal protection against enforced disappearances, op. cit., p. 4, note 15; Proyecto Desaparecidos, Internet: <http://www.desaparecidos.org/arg/victimas/eng.html> 31/10/2008. In Chile, the National Commission on Truth and Reconciliation and its successor, the National Corporation on Reparation and Reconciliation documented more than 3000 enforced disappearances. See: Amnesty International, Chile: The case against Augusto Pinochet, AMR 22/004/2008, 16 October 2008. In Guatemala, estimated number of people disappeared is 30000, Enforced Disappearances Information Exchange Center, Internet: <http://www.ediec.org/en/world-map/regional-overview/americas> 31/10/2008.
- 8 Federation Latinoamericana de Asociaciones de Familiares de Detenidos Desaparecidos (FEDEFAM) estimates that more than 90 000 peoples were subjugated to enforced disappearances, Internet <http://www.desaparecidos.org/fedefam/eng.html> 31/10/2008.
- 9 In Algeria the number of disappeared is in variation between 3000 and 8000 people. See: Enforced Disappearances Information Exchange Center, available at <http://www.ediec.org/en/world-map/regional-overview/north-africa-and-middle-east> 31/10/2008; International Center for Transitional Justice, Internet: <http://www.ictj.org/en/where/region5/508.html> 31/10/2008.

enforced disappearances these cases are not reported.¹⁰ There is a reasonable doubt that enforced disappearances did occur during internal violence and conflicts.¹¹ Europe was confronted with the problem of enforced disappearances in the eve of the 20th century in the regions of former Yugoslavia, Belarus, Russian Federation (mostly Chechnya), Ukraine and Uzbekistan.

Recent practice of enforced disappearance

In its Human Rights Agenda for the New Administration of the United States Human Rights Watch suggested that president Obama should “put a definitive end to the CIA’s secret detention program in which apprehended individuals “disappeared *without acknowledgment* into unknown detention facilities and without access to anyone but their jailors and interrogators” and “sign and press the Senate to ratify the Convention against Enforced Disappearance to signal an intention to never again engage in such practices”.¹² Former U.S. President George W. Bush admitted in September 2006 that secret detentions were practiced in the course of “War on Terror”.¹³ UN Working Group on Enforced and Involuntary Disappearances in its 2007 Report has stated concern about the “continuing policy and practice of rendition by the United States of America”.¹⁴

10 UN Economic and Social Council, Commission on Human Rights, *Civil and Political Rights Including the Questions of Disappearances and Summary Executions, Question of Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2005/65, 23 December 2004, p. 9, para. 9.

11 *Enforced Disappearances Information Exchange Center* points out that there is “an enormous gap between the numbers of the NGOs and the communications the UNWGEID receives. This gap can be seen as proof of the underreporting. A survey carried out by Linking Solidarity showed that the UNWGEID had received communication on little more than 2100 cases of enforced disappearances in the region, whereas according to the total numbers (an average of figures of local and international NGOs) more than 30,000 enforced disappearances had been counted”. Internet: <http://www.ediec.org/world-map/regional-overview/sub-sahara> 17/11/ 2009.

12 US: Human Rights Agenda for the New Administration, Human Rights Watch, Internet: <http://www.hrw.org/en/news/2008/11/14/us-human-rights-agenda-new-administration> 26/11/2008 (emphasis added).

13 See: “Off the record: U.S. responsibility for the enforced disappearances in the “War on Terror”, joint report by Amnesty International, Cageprisoners, the Center for Constitutional Rights, the Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and Reprieve, 2007 and The United States’ “Disappeared”: The CIA’s Long-Term “Ghost Detainees”, Human Rights Watch Briefing Paper, October 2004.

14 UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including the Right to Development*,

The total number of enforced disappearances in the world is unknown as only reported cases could be taken into consideration. The UN Working Group on Enforced and Involuntary Disappearances reported that since its inception it has transmitted 52 952 cases to Governments, but that there are still 42 393 cases under its active consideration.¹⁵ It sums up to 95 345 reported cases of enforced disappearances in 79 States.¹⁶ In its statement on the occasion of the International Day of the Disappeared¹⁷ Working Group expressed concerns “over growing number of cases of enforced disappearances occurring throughout the world, particularly in Chad, Pakistan, the Philippines, Sri Lanka, Sudan and Thailand”.¹⁸ In the most recent report, the Working Group stated that it has transferred 1203 new cases to the Governments; 83 of them allegedly occurred in the period of the latest review, from 1 December 2007 till 30 November 2008.¹⁹

LEGAL REGULATION OF THE PROBLEM OF ENFORCED DISAPPEARANCE

Enforced disappearance as violation of multiple human rights

The problem of enforced disappearances was previously addressed as a violation of multiple human rights i.e. right to life, liberty and security; right not to be subjected to torture or to cruel, inhuman or degrading treatment or

Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/7/2, 10 January 2008, p. 85, para. 401.

15 UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including the Right to Development, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/10/9, 6 February 2009, p. 2.*

16 *Ibidem.*

17 The August 30th was established as the (International) Day of Disappeared in 1983 by the Latin American non-governmental organization FEDEFAM (*Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos*).

18 Statement by UNWGEID on the Occasion of the International Day of Disappeared, 28 August 2008, Internet: <http://www2.ohchr.org/english/issues/disappear/index.htm> 30/10/2008.

19 UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including the Right to Development, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/10/9, 6 February 2009, p. 2.* The Group transmitted cases to Governments of Algeria, Argentina, Bangladesh, Cameroon, Chad, Colombia, India, Indonesia, the Islamic Republic of Iran, Iraq, Japan, Libyan Arab Jamahiriya, Mexico, Morocco, Namibia, Nepal, Pakistan, Peru,

punishment; right to recognition everywhere as a person before the law; right not to be subjected to arbitrary arrest, detention or exile; right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law; right to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge against person.

These rights are confirmed at the universal level in the Universal Declaration of Human Rights (1948),²⁰ International Covenant on Civil and Political Rights (1966),²¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment (1988) and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.²² Practice of enforced disappearances also violates many of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights (1966) such as right to social security or protection of family.²³

The problem of enforced disappearances was addressed at regional level as a violation of human rights protected by the European Convention on Human Rights and Fundamental Freedoms (1950),²⁴ American Convention on Human Rights (1969)²⁵ and African Charter of Human and Peoples' Rights (1981).

Philippines, the Russian Federation, Sri Lanka, Sudan, Switzerland, Thailand, Turkey, Viet Nam, Yemen and Zimbabwe. In the period under review there is one outstanding (not clarified) case reported to the Working Group.

20 See: Articles: 3, 5, 6, 8, 9 and 10.

21 See: Articles: 7, 9, 14 and 16.

22 The first instrument is adopted by General Assembly Resolution 43/173 (9 December 1988) and the second one in the annex to Economic and Social Council Resolution 1989/65 of 24 May 1989 which was finally adopted in the General Assembly resolution 44/162 of 15 December 1989.

23 See: Articles 9 and 10.

24 See: European Court of Human Rights, *Kurt v. Turkey*, 1998. *Timurtas v. Turkey*, 2000; *Çiçik v. Turkey*, 2001. See: Gobind Singh Sethi, The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances, *Human Rights Brief*, Volume 8, Issue 3, 2001, p. 29.

25 See: Inter-American Court on Human Rights, *Velásquez - Rodriguez v. Honduras*, 1988, *Caballero Delgado e Santana v. Colombia*, 1995, *Blake v. Guatemala*, 1998.

Legal regulation of enforced disappearance per se

The process of regulating the enforced disappearances as a specific human rights violation started with the work of UN Commission for Human Rights and General Assembly. In its Resolution 33/1973, the Assembly expressed concern about the practice of enforced and involuntary disappearances in various parts of the world and called upon Governments to investigate such cases, to ensure protection of human rights of detained persons and full accountability of law enforcement and security agencies in discharge of their duties.²⁶ The General Assembly designated the Commission for Human Rights to consider the problem and make recommendations. The Commission, “convinced of the need to take appropriate action”, consulted Governments and decided to establish a special mechanism to “examine question relevant to enforced and involuntary disappearances” – the Working Group on Enforced and Involuntary Disappearance.²⁷

However, the initiative to regulate the problem of enforced disappearance in the form of convention was first presented by the human rights NGOs at the Human Rights Institute of the Paris Bar Association colloquium in 1981.²⁸ Further initiatives came from the South-American organisations and associations of relatives of victims of enforced disappearance.

In 1992 the General Assembly adopted *Declaration on the Protection of All Persons from Enforced Disappearances*²⁹ which has qualified the act of enforced disappearance as “an offence to human dignity” and condemned it as a “grave and flagrant violation of the human rights and fundamental freedoms”.³⁰ The Declaration proclaimed that “no State shall practice, permit or tolerate enforced disappearances”.³¹

Nevertheless, it was the draft of a regional instrument that inspired adoption of this declaration. Organisation of American States (OAS) adopted *Inter-*

26 UN General Assembly, Resolution “*Disappeared persons*” of 20 December 1978, A/33/173.

27 UN Commission on Human Rights, Resolution 20 (XXXVI): *Question of missing and disappeared persons*, 1563rd Meeting, 29 February 1980.

28 Kirsten Anderson, How effective is the Enforced Disappearance Convention?, *Melbourne Journal of International Law*, Vol. 7, Issue 2, October 2006, p. 266.

29 UN General Assembly, *Declaration on the Protection of all Persons from Enforced Disappearance*, 18 December 1992, A/RES/47/133.

30 Article 1 of the Declaration.

31 Article 2 of the Declaration.

American Convention on Forced Disappearance of Persons on 9 June 1994 which entered into force on 28 March 1996.³² This instrument was the first legally binding document which prohibited enforced disappearance *per se*.

The final step towards the establishment of universal right not to be subjected to enforced disappearance was undertaken by the Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights. The Sub-commission adopted the first draft in 1998.³³ The Commission on Human Rights established an Inter-sessional Open-ended Working Group in 2001 with the task of drafting a “legally binding normative instrument for the protection of all persons from enforced disappearance”.³⁴ The Working Group finished with the entrusted work in September 2005.³⁵ United Nations General Assembly adopted the *International Convention for the Protection of All Persons from the Enforced Disappearance* at the 61st session on 20 December 2006.³⁶

INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

International Convention for the Protection of All Persons from the Enforced Disappearance is the first *universal* treaty that states the *right of any person not to be subjected to enforced disappearance*.³⁷ The system of protection is based on four key elements: prohibition, prevention, monitoring and punishment.

Definition of enforced disappearance

The Convention defines enforced disappearance as an “arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or

32 Convention was adopted at the 24th regular session of the OAS General Assembly. There are 13 State Parties. United States were not among signatories and they have not ratified the Convention.

33 Presiding of the working group that drafted Convention was a UN Special Rapporteur for Haiti, Louis Joinet, author of the draft text of 1992 Declaration on Enforced Disappearance.

34 UN Commission on Human Rights, Resolution 2001/46, para. 12.

35 Chairman of the working group was French Ambassador Bernard Kessedjian.

36 Convention was adopted as a Resolution A/RES/61/177. Human Right Council in its first resolution on 29 June 2006 adopted text of the Convention, A/HRC/RES/1/1. Third Committee of the General Assembly adopted the text on 13 November 2006, 61st session of GA UN, Third Committee, 45th meeting, A/61/488.

37 The Preamble of the Convention.

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”.³⁸ Constituent elements of the crime of enforced disappearance are:

- a) Deprivation of liberty in any form,
- b) State act *i.e.* it is an act conducted by State agents *or* persons or group of persons have acted with the authorization, support or acquiescence of the State,
- c) Refusal to acknowledge deprivation or concealment of information on whereabouts of person which places person deprived of liberty outside the protection of law.

The first element is the deprivation of liberty. Deprivation of liberty implies primarily restriction of physical freedom *i.e.* freedom to act or move.³⁹ However, whether a person is deprived of liberty or not depends from the circumstances in each concrete case and includes examination of criteria such as a form of deprivation, its duration and effects.⁴⁰ Article 1 of the Convention enumerates as forms of deprivation of liberty an arrest, detention and abduction.⁴¹ However, the list is not exhausted as suggested by the wording “or any other form of deprivation of liberty”.⁴²

The second element of the definition of the enforced disappearance is a State involvement in the crime. The Convention excludes from the definition of enforced disappearance acts committed by non-state actors.

Drafting history reveals differing views on the exclusion of acts not attributable to a State from the definition. Some delegations expressed concerns about the confusion of different law corpuses and legitimizing non-state actors on international plane, while others advocated their inclusion into definition.⁴³ International expert charged by the Human Rights Commission to examine the

38 Article 2 of the Convention.

39 See Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden Baden, 2008, p. 268, footnote 579.

40 See: ECtHR, *Guzzardi v. Italy*, 7 May 1981, para. 92.

41 These forms were also enumerated in Article 7(2) (i) of the Rome Statute.

42 Other forms of deprivation of liberty may include: slavery, forced labour, forced placement in certain locations *e.g.* psychiatric institutions.

43 See: Report of first session of Inter-sessional 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.

existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances concluded: “*Since* the concealment of all facts surrounding this crime is part of its definition, it is often very difficult to know whether the perpetrators acted with or without “the authorization, support or acquiescence of the State”. This problem was also acknowledged by the drafters of the international convention on the protection of all persons from forced disappearances when referring, in article 1.2, to instruments containing “provisions of broader application”. In order to ensure “full protection” from enforced disappearance, a future binding instrument, at least in relation to domestic criminal law, should, therefore, equally apply to State and organized non-State actors.”⁴⁴

The Council of Europe’s Committee on Legal Affairs and Human Rights also advocated inclusion of acts committed by non-state actors into definition of enforced disappearance.⁴⁵ The UN Working group’s general comment on the definition of enforced disappearance concludes that the crime should be defined in a manner that “clearly distinguishes it from related offences such as abduction or kidnapping.”⁴⁶

Advocating wider definition of the crime of enforced disappearance may be justifiable if we have in mind that the Statute of International Criminal Court includes acts of political organisations in the scope of enforced disappearance as crime against humanity.⁴⁷ However, solution accepted in the Article 2 of the Convention could be interpreted in the following way. States and not non-state actors are the Parties to the human rights protection instruments. They are obliged to provide legal protection of persons deprived of liberty. If a State doesn’t investigate enforced disappearances committed by non-state actors it is failing to provide protection to individuals under its jurisdiction. Therefore, the Convention has proscribed an obligation of State to “take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting *without* the authorization, support or acquiescence of the State and to bring those responsible to justice“.⁴⁸

44 Report submitted by Mr. Manfred Nowak pursuant to paragraph 11 of Commission’s resolution 2001/46, E/CN.4/2002/71, 8 January 2002.

45 Council of Europe, Parliamentary Assembly, Report on Enforced disappearances of 19 September 2005, Doc. 10679.

46 UNWGEID’s General Comment on the definition of enforced disappearances, Internet: http://www2.ohchr.org/english/issues/disappear/docs/disappearance_gc.doc 31/10/2008.

47 Article 7(2) (i) of the Statute of the International Criminal Court (Rome Statute).

48 Article 3 of the Convention (emphasis added).

Refusal or denial of disappearance is the third characteristic of the crime of enforced disappearance. By denying that a disappearance has happened or by refusing to disclose the information on the whereabouts of a person, a State is automatically placing him or her outside the protection of law. A refusal of acknowledgment of disappearance or concealment of information on the whereabouts of deprived person is an element that helps us to differentiate between enforced disappearance and similar cases (e.g. missing persons, criminal abductions, kidnapping). If there is some judicial control over the detention or State assists and supports the efforts to find out the whereabouts of the person we do not talk about enforced disappearance. The qualification of situation as enforced disappearance requires close examination of the circumstances of concrete case. There may be situations where government has acknowledged a detention in general but provided no information on the names of detainees and their locations. This kind of practice would also amount to act of enforced disappearance.⁴⁹

Prohibition and Incrimination

As one author points out “the most significant aspect of the Convention” is prohibition of individual acts of enforced disappearance which do not amount to crimes against humanity or crime of torture.⁵⁰ More than that, the Convention establishes *absolute prohibition* of enforced disappearance *ratione personae* and *ratione materiae*:

No one shall be subjected to enforced disappearances.

No exceptional circumstances whatsoever, whether a state of war or a threat to war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”⁵¹

Right not to be subjected to enforced disappearance pursuant to the Convention can not be derogated. Logical consequence of the absolute prohibition is the obligation of State Parties to incriminate enforced disappearances as a separate offence under their criminal law.⁵² States “shall

49 Article 17(1) of the Convention prohibits secret detentions.

50 Kirsten Anderson, *How effective is the Enforced Disappearance Convention?*, op. cit., p. 269.

51 Article 1 of the Convention.

52 Article 4 of the Convention.

make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness”.⁵³

Does reference to extreme seriousness has an effect on the characterisation of the elements of the crime? There are disagreements among authors on the quality of the *mens rea* element which are produced by different interpretations of the international regulation of enforced disappearances as a *crime against humanity*, but were also expressed by some delegations in the drafting process.⁵⁴ Analyzing Article 7(1)(i) of the Rome Statute one author concludes: “...the scope of the incrimination is restricted by a new requirement: prosecution must prove the specific intent (*dolus specialis*) of the perpetrator to remove victims ‘from the protection of law for a prolonged time.’”⁵⁵

Manfred Novak has concluded in his report that subjective element of the crime set out in the Rome Statute puts “an extremely heavy burden on the prosecution to prove that the individual perpetrator was aware from the beginning of committing the crime that the deprivation of liberty would be followed by its denial and that he (she) intended to remove the victims from the protection of the law”.⁵⁶ Other authors emphasise that the removal from the protection of law is “simply necessary result” of the refusal or denial of information on the person deprived of liberty and there is no need to prove that the perpetrator “have had the additional specific intent to remove the person from the protection of law”.⁵⁷ The wording used in instruments regulating problem of enforced disappearance seems to corroborate their conclusions since it is implied that it is the refusal or denial of deprivation of liberty “*which* places such person outside the protection of the law”.⁵⁸

53 Article 7 of the Convention.

54 Delegation of United States declared that “the definition of the crime (Article 2) would have been much improved had it been more precise and included an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law”. *Note verbale dated 20 June 2006 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Human Rights Council*, Human Rights Council, A/HRC/I /G/I, 27 June 2006.

55 Sevane Garibian, *Enforced Disappearances of Persons*, June 2008. Glossary term; Internet: <http://www.massviolence.org/Enforced-Disappearances-of-Persons> 30/10/2008.

56 Report submitted by Mr. Manfred Nowak pursuant to paragraph 11 of Commission’s resolution 2001/46, E/CN.4/2002/71, 8 January 2002, p. 29.

57 Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, op. cit., p. 269.

58 Article 2 of the Convention (emphasis added). Same wording is used in the Preamble of the 1992 Declaration. Inter – American Convention (1994) stipulates in Article 2

Author of this article believes that complexity of the enforced disappearance and influence of the originator of the crime i.e. State, do not support the inclusion of *dolus specialis* in the mental element of the crime since that would made all efforts to punish the crime inutile.

What is the relation between the Convention and the Rome Statute? Article 5 of the Convention states that the “widespread or systematic practice of enforced disappearance constitutes crime against humanity *as defined in applicable international law* and shall attract the consequences provided for under such applicable international law”. Convention does not affect scope of the definition contained in the Article 7(1)(i) of the Rome Statute. Abovementioned Article 5 may cause misleading interpretation that only certain quantity of enforced disappearances will be qualified as a crime against humanity. Contrary to that, as authors indicate, even one case of enforced disappearance would suffice to crime against humanity if it is committed as a part of the widespread or systematic attack on civilian population.⁵⁹ It is a position confirmed in the ICTY jurisprudence.⁶⁰ As Hall emphasises, use of the “singular form of the crime in the English version of the Disappearances Convention rather than the plural recognizes that even a single enforced disappearance is a crime under international law”.⁶¹

The Convention sets out in Article 6 a minimal standard of *responsibility for crime of enforced disappearance*.⁶² The standard includes individual criminal responsibility *stricto sensu* of “any person, who commits, orders, solicits or induces the commission of, attempt to commit a crime”⁶³ as well as criminal responsibility of a superior.⁶⁴ In the case of superior responsibility it is clearly

“...thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees” (emphasis added).

59 Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, op.cit., p. 225.

60 Prosecutor v. Kvočka, I-98-30/1-A, Trial Chamber Judgment, para. 208; Prosecutor v. Kupreškić, IT-96-16-A, Appeals Chamber Judgement, 23 October 2001.

61 Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, op. cit., p. 225.

62 Minimal standard is implied by the wording “Each State Party shall take the necessary measures to hold criminally responsible *at least*” (emphasis added).

63 Article 6(1)(a) of the Convention.

64 Superior will be responsible for enforced disappearance if he: Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced

stated that provision of the Convention is “without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or a person effectively acting as a military commander”.⁶⁵ The minimal standard leaves place for inclusion of other modes of responsibility.⁶⁶

Continuous nature⁶⁷ of the crime of enforced disappearance is reflected in the provisions on the exercise of *statute of limitations* in national criminal codes. The Convention obliges those State Parties applying statute of limitations in relation to enforced disappearance to take necessary measures to ensure that limitation for initialising criminal proceedings is “of long duration and is proportionate to the extreme seriousness of this offence”.⁶⁸ More, it clearly delineates that time moment for initiation of proceedings is a “moment when the offence of enforced disappearance ceases, taking into account its continuous nature”.⁶⁹ The right of victims to an effective remedy must be guaranteed “during the term of limitation”.⁷⁰ In addition, the Convention

disappearance; Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; or Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution. Article 6(1)(b) of the Convention.

- 65 Article 6(1)(c) of the Convention. This reference is implying standard of command or superior responsibility as applied in international humanitarian law. *See*: Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, Articles 86 and 87.
- 66 Elements of Crimes enumerated in the Rome Statute explain that “given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose”, Elements of Crimes, p. 11.
- 67 Due to lack of any information about fate and whereabouts of the person he/she is left outside the protection of law for a prolonged period of time.
- 68 Article 8(1)(a) of the Convention.
- 69 Article 8(1)(b) of the Convention.
- 70 Inter-American Court on Human Rights stated in *Velásquez - Rodríguez v. Honduras*, 1988 that an effective remedy is one which is “capable of producing the result for which it was designed”, Merits, para. 66. Remedy is ineffective “if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied”, *Velásquez - Rodríguez v. Honduras*, 1988, Merits, para. 66. The UN Declaration on Enforced Disappearance envisages that in situation when remedies provided in Article 2 of the ICPR are no longer effective “the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established”, Article (17)(2). Thus, it looks that the International Convention on Enforced Disappearance provides fewer safeguards to a right to an effective remedy.

repeats well known rule that statute of limitations is not applicable in relation to the crimes against humanity.⁷¹

It is also important, given the background of the crime, that the Convention clearly states that “for the purposes of extradition between State 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” and that “a request for extradition based on such an offence may not be refused on these grounds alone”.⁷² This solution may seem *prima facie* contradictory because enforced disappearance is usually politically motivated act. It serves the purpose of eliminating political opponents and terrorising civilian population. However, this political objective is achieved by removing the person from the protection of law. Since act of enforced disappearance is intended to produce consequences contravening the law it is a criminal not political offence and as such must be incriminated.

INVESTIGATION OF ENFORCED DISAPPEARANCE

Incrimination of enforced disappearance in national criminal legislation presupposes investigation procedure. The Convention provides two modes for initiating investigation of enforced disappearance – individual complaint to competent authorities and initiation *proprio motu* by the competent authorities.

In the first case, there is an obligation of authorities to examine allegation and “where necessary, undertake without a delay a thorough and impartial investigation”.⁷³ In the second case, if there are reasonable grounds for “believing that a person has been subjected to enforced disappearance” authorities are obliged to investigate a case even if there is no formal complaint.⁷⁴

To put these provisions into effect, the Convention obliges State Parties to ensure conditions which will allow investigation of the enforced disappearance. States must take necessary measures to prevent ill-treatment and intimidation of persons involved in investigation (complainant, witnesses, relatives of the disappeared person, defense counsel, persons conducting an investigation),⁷⁵

71 Article 8(2) of the Convention.

72 Article 13(1) of the Convention.

73 Article 12(1) of the Convention.

74 Article 12(2) of the Convention.

75 Article 12(1) of the Convention.

provide access to documentation and relevant information⁷⁶ or places of detention⁷⁷ and to prevent persons suspected of committing crime to influence or hinder investigation.⁷⁸

Definition of the “victim” of enforced disappearance

The Convention has achieved a big step forward by defining “victim” of enforced disappearance in a protective manner. A victim is “the disappeared person *and any individual* who has suffered harm as direct result of an enforced disappearance”.⁷⁹ Protective approach has been prompted by the numerous problems with which members of the family of the disappeared person are faced due to the continuous nature of the crime. The Convention does not provide the list or type of harm that could be suffered as a direct result of enforced disappearance. Two groups of possible direct consequences of enforced disappearance could be identified. The first group includes physical or mental harm to the victim e.g. threat by or use of violence, suffering for the lost member of family etc. The second group of consequences is identified as discrimination and inability to exercise rights in the field of social welfare, financial matters, property rights and family law (loss of earnings, cost for legal assistance in finding disappeared or other).⁸⁰

Protective approach in defining victims of enforced disappearance necessarily produces victim’s rights. First, a victim has a right to know the truth about circumstances of the enforced disappearance, about the progress and result of the investigation of enforced disappearance and about the fate of the disappeared person.⁸¹ Second, a victim has a right to obtain reparation and prompt, fair and adequate compensation.⁸² The right to obtain reparation covers

76 Article 12(3)(a) of the Convention.

77 Article 12(3)(b) of the Convention.

78 Article 12(4) of the Convention.

79 Article 24(1) of the Convention (emphasis added).

80 Article 24(6) of the Convention. *See: also* UNGWEID general comment on article 19 of the 1992 Declaration, UN Economic and Social Council, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Question of Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1996/38, 15 January 1996, para. 73.

81 Article 24(2) of the Convention.

82 Article 24(4) and (5) of the Convention. UNWGEID general comment on article 19 of the 1992 Declaration explains that adequate compensation is one that is „proportionate to the gravity of the human rights violation (e.g. period of disappearance, the conditions of

material and moral damages. The Convention enumerates in non-exhausting list possible forms of reparation (restitution, rehabilitation, satisfaction, including restoration of dignity and reputation, and guarantee of non-repetition). Finally, victims have a right to form and participate freely in organisations and associations dealing with issues regarding enforced disappearance.⁸³

Protection of children

The Convention has addressed a particularly important issue - the protection of children, victims of enforced disappearance. In accordance with its protective approach in defining a victim of enforced disappearance, the Convention provides special protection not only to the children who are subjected to enforced disappearance but also to children whose parents or legal guardian are subjected to enforced disappearance and children born during the captivity of a mother subjected to enforced disappearance.⁸⁴

In order to protect children from enforced disappearance, States are obliged to take necessary measures under national criminal law to prevent and punish the wrongful removal of children victims of enforced disappearance and falsification, concealment or destruction of documents on their true identity.⁸⁵ They are also obliged to take necessary measures to search and identify children victims of enforced disappearance, to return them to their family and to cooperate with other State Parties to fulfil these obligations.⁸⁶ The Convention acknowledges the right of a child to preserve or re-establish its identity by imposing obligation to review adoption and placement procedures and to annul them if they are result of the practice of enforced disappearance.⁸⁷

detention) and to the suffering of the victim and the family“, UN Economic and Social Council, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Question of Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1996/38, 15 January 1996, para. 73.

83 In Article 24(7) the Convention has admitted the significant role these organizations and associations play in fighting the crime. Legal regulation of the crime and fight against the impunity for the crime of enforced disappearance were initiated by the associations of family members of disappeared persons.

84 Article 25(1)(a) of the Convention.

85 Article 25(1)(b) of the Convention.

86 Article 25(2) and (3) of the Convention.

87 Article 25(4) of the Convention.

Provisions on the protection of children victims of enforced disappearance are guided by the bests interest of the child with due respect for the right of a child to express freely its view regarding this issue.⁸⁸ This right is subjected to due considerations regarding its age and maturity.

Prevention of enforced disappearance

In order to prevent crime of enforced disappearance the Convention sets up an obligation of State Parties to enact certain safeguards in their national legal systems. These safeguards concern *regulations with regard the deprivation of liberty*.

First, State Parties are required to regulate conditions and authorities for giving orders of deprivation of liberty.⁸⁹ Second, they are obliged to guarantee that persons deprived of liberty are held in officially recognized and supervised detention facilities and have a right to communicate with and be visited by family, legal counsel, consular authority (if he/she is detained in foreign country) or any person of his/her choice in accordance with the law, and to guarantee the right of competent and authorized authorities and institutions to visit detention places.⁹⁰ Third, person deprived of liberty or in the case of suspected enforced disappearance, any person with legitimate interest (relatives or their representative or legal counsel), shall be entitled in all circumstances to initiate proceedings before the court on examination of the lawfulness of the deprivation.⁹¹ Fourth, the Convention requires from State Parties to establish and maintain official register and/or records on the persons deprived of liberty which shall as a minimum contain information about: identity of deprived person, date, time and place of deprivation and authority which conducted deprivation; authority responsible for supervision of deprivation; date, time and place where person is held; state of health or in the case of death, the circumstances and cause of death and destination of remains; and date and time of release or transfer to another detention facility, destination and authority responsible for transfer.⁹² In the case of release, State Parties shall take necessary measures to ensure reliable verification of release and to assure physical integrity of such persons and their right to exercise fully their rights in

88 Article 25(5) of the Convention.

89 Article 17(2)(a) and (b) of the Convention.

90 Article 17(2)(c), (d) and (e) of the Convention.

91 Article 17(2)(f) of the Convention.

92 Article 17(3) of the Convention.

time of release without prejudice to any obligation they may be subjected under national law.⁹³

For the reason of effective prevention the Convention obliges State Parties to guarantee *right* of any person with legitimate interest *to information* contained in mentioned registers and/or records, at least.⁹⁴ State Parties shall take appropriate measures to safeguard this right by protecting person seeking information and persons participating in investigation from intimidation, ill-treatment or sanction.⁹⁵ The right to information is to be exercised in the framework of existing human rights rules. Collection, use and storage of the said data, including medical and genetic data, shall not be used or made available for purposes other than investigation and search for the disappeared person and shall not infringe or have effect of infringing human rights, fundamental freedoms or human dignity of individual.⁹⁶ The right to information may be restricted on an exceptional basis, where strictly necessary and provided by the law and if the transmission of data would endanger safety or privacy of the person, hinder criminal investigation or other reason in conformity with law and applicable rules of international law.⁹⁷ It is of great importance for effective prevention of enforced disappearance that Convention obliges State Parties to guarantee the right to a prompt and effective judicial remedy as a mean to obtain without delay information on the person deprived of liberty.⁹⁸ This right to remedy may not be suspended or restricted in any circumstances. Obstruction of the right to information by failing to record deprivation of liberty or any information about the deprivation, by provision of inaccurate information or by refusing to provide information on the deprivation shall be prevented and sanctioned.⁹⁹

Another form of prevention of enforced disappearance is education, training and information on the relevant provisions of the Convention.¹⁰⁰ This provision targets law enforcement personnel, military, medical personnel, public officials and others who may be involved in the custody or treatment of

93 Article 21 of the Convention.

94 Article 18(1) of the Convention.

95 Article 18(2) of the Convention.

96 Article 19 of the Convention.

97 Article 20(1) of the Convention.

98 Article 20(2) of the Convention.

99 Article 22 of the Convention.

100 Article 23(1) of the Convention.

deprived person. If they can recognize the crime they could prevent it by refusing to be involved in it or by reporting it.

Monitoring compliance with the Convention

The International Convention for the Protection of All Persons from Enforced Disappearance follows the pattern demonstrated in human rights treaties concerning monitoring mechanisms. It entitles expert body – *Committee on Enforced Disappearance* (CED) - to monitor compliance with the provisions of the treaty.¹⁰¹ Functions of the CED are:

- to consider reports of State Parties;¹⁰²
- to consider request for urgent action to search and find disappeared person;¹⁰³
- to consider communications from or on behalf of individuals;¹⁰⁴
- to consider communications from State Parties;¹⁰⁵
- to conduct a visit to State Party to investigate serious violations of the provisions of the Convention¹⁰⁶ and
- to bring urgently to the attention of the UN General Assembly that enforced disappearance is practised on a widespread or systematic basis.¹⁰⁷

Members of the Committee act in personal capacity, independently and impartially.¹⁰⁸ As a non-judicial monitoring mechanism, Committee produces comments, observations or recommendations. It may ask additional information from concerned State Party¹⁰⁹ or issue request that a State Party should take necessary measures, including interim measures to locate and find disappeared person¹¹⁰ or to avoid possible irreparable damage to the victims of the alleged violations of the Convention.¹¹¹

101 Article 26(1) of the Convention.

102 Article 29 of the Convention.

103 Article 30 of the Convention.

104 Article 31 of the Convention.

105 Article 32 of the Convention.

106 Article 33 of the Convention.

107 Article 34 of the Convention.

108 Article 26(1) of the Convention.

109 Article 29(4) of the Convention.

110 Article 30(3) of the Convention.

111 Article 31(4) of the Convention.

Committee acts in accordance with the guiding principle of co-operation. It co-operates with State Parties, United Nation's institutions and bodies and other treaty bodies established by the international instruments in order to ensure protection of all persons from enforced disappearance.¹¹² Cooperation is reflected on the fact that Committee informs concerned State Party before publishing its observations in the annual report to the UN General Assembly providing her a possibility to answer.¹¹³ State Party may request that her answers and comments on the Committee's observations are also published in annual report.¹¹⁴

Committee's competence *ratione temporis* is restricted to cases of enforced disappearances committed after entry into force of the Convention.¹¹⁵ In relation to a State which becomes Party to the Convention after its entry into force Committee's competence commences from the moment when the Convention enters into force for the State concerned.¹¹⁶

We may ask if it was necessary to import another monitoring body into the UN system of protection of human rights. It seems that even the authors of the Convention were not assured that it is effective to create another monitoring body. This could be implied by the provision of Article 27 which proscribes that conference of State Parties will decide "whether it is appropriate to transfer to another body – without excluding any possibility – the monitoring" of the Convention. Can the proliferation of monitoring bodies have a pessimistic impact on the ratification and implementation of the Convention? The United States have declared in their Statement on the Draft Convention on Enforced Disappearances that they will continue to "support the use of an existing treaty body to perform monitoring functions, that is Human Rights Committee, which currently deals with forced disappearances, in view of the Committee's expertise; in the interests of consistency of jurisprudence, efficiency, avoidance of redundancy, and cost".¹¹⁷ Provision that obliges the Committee on Enforced Disappearances to consult human rights treaty bodies,

112 Article 28 of the Convention.

113 Article 36(2) of the Convention.

114 *Ibidem*.

115 Article 35(1) of the Convention.

116 Article 35(2) of the Convention.

117 *Note verbale dated 20 June 2006 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Human Rights Council*, Human Rights Council, A/HRC/1/G/I, 27 June 2006.

particularly the Human Rights Committee, confirms the fears that the proliferation of treaty bodies may produce inconsistency of observations or recommendations as well as a confusion and reluctance of states to be subjected to the provisions of the Convention.¹¹⁸

We should also bear in mind that another UN body designated to work on the cases of involuntary and enforced disappearance already exists.¹¹⁹ It is the United Nations Working Group on Enforced or Involuntary Disappearances. How should we interpret the Convention's silence on the relation between the Committee and United Nations Working Group? Article 28(1) of the Convention implies complementary character of relation since it proscribes that the Committee should cooperate with the Working Group.¹²⁰ This was confirmed in the latest Working Group report where it is stated: "*The Working Group is committed to cooperating with the committee under the Convention when it enters into force, and believes that the committee will complement its*

118 Article 28(2) of the Convention reads: "As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations".

119 United Nations Working Group on Enforced and Involuntary Disappearances was the first thematic mechanism to deal with specific human rights violation in the system of the UN. It was established by the Commission on the Human Rights in Resolution 20 (XXXVI) of 29 February 1980. Its mandate is "to assist the relatives of disappeared persons to ascertain the fate and whereabouts" of their family members. On its regular sessions Group considers reports on disappearances submitted by the relatives or human rights organisations on behalf of relatives. It is also concerned with the protection of relatives, legal counsels of the relatives of disappeared person or members of non-governmental organisations dealing with issues of enforced disappearance. If these requests satisfy necessary conditions Group transmits information to State concerned requesting investigation. In the case of urgent action Group Chairman may act in between regular sessions to prevent irreparable damage. Group reports annually on its activities to the Commission on Human Rights on a country by country basis including its recommendations and observations on the reported and transmitted cases of enforced or involuntary disappearances. Its role ends when the fate and whereabouts of the person are established. *See: Fact Sheet No. 6 (Rev. 2), Enforced or Involuntary Disappearances, Internet: <http://www2.ohchr.org/english/issues/disappear/members.htm#facts> 30/10/2008.*

120 Article 28(1) reads as follows: „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 ...”

work in preventing enforced disappearances".¹²¹ The Group unlike the Committee does not investigate directly reported cases of enforced disappearance, but acts as a channel of communication with Governments to resolve the fate and whereabouts of disappeared persons. Remains to be seen how these two instruments of protection will function in the future.

The Convention and other bodies of law

The Convention clearly states that it shall not affect "any provisions which are more conducive to the protection of all persons from enforced disappearance".¹²² The provisions of the Convention establish the minimal standard of protection. If rules of national law of State Parties or international law binding State Parties offer protection that overrides that minimal standard they will be applied.

Also, the Convention acknowledges *lex specialis* status of international humanitarian law in armed conflicts.¹²³ It also accepts the concurrent right of the International Committee of the Red Cross (ICRC) to visit places of detention in situations not covered by international humanitarian law with authorisation of the State Party.¹²⁴

121 UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including the Right to Development, Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/10/9, 6 February 2009, p. 85, para. 461.

122 Article 37 of the Convention.

123 Article 43 of the Convention. On *lex specialis* status of international humanitarian law and its relation with human rights law *See*: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996 (I), p. 239, 240, paras. 24, 25, Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, 2004, p. 177-8, paras. 105, 106.

124 Mandate of the ICRC to visit places of detention of protected persons in situation of international armed conflicts is regulated by the Geneva Convention of 1949 and their Additional Protocol I. In situation of non-international armed conflicts in accordance with Common Article 3 of the 1949 Geneva Conventions and Article 18 of the Additional Protocol II of the 1949 Geneva Conventions ICRC may offer its humanitarian services to the Party to the Conflict. ICRC according to its Statute may offer its humanitarian services to the Government in situation of internal disturbances and internal tensions. Internal tensions and disturbances are situation of violence not being armed conflict. *Internal tensions* cover situation of "serious tensions (political, religious, racial, social, economic, etc) but also the sequels of armed conflicts or internal disturbances. Such situations have one or more of the following characteristics if not all at the same time> large scale arrests; a large number of 'political' prisoners; the probable

PERSPECTIVES OF THE CONVENTION

Is the overwhelming optimism about the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance justified?

The Convention has been adopted in December 2006 and opened for signatures in February 2007.¹²⁵ The Convention has 81 States Signatories.¹²⁶ Today, in 2009, the Convention has not yet entered into force. Out of necessary twenty, so far 16 States deposited instruments of ratification or accession with the Secretary General of United Nations.¹²⁷ States that have deposited instruments of ratification or accession are Albania, Argentina (2007), Mexico, Honduras, France, Bolivia and Senegal (2008), Cuba, Kazakhstan, Uruguay, Mali, Japan, Nigeria, Germany, Spain and Ecuador (2009).¹²⁸ We may compare these numbers with those in UN Working Group reports which indicate occurrence of enforced disappearances in more than 70 States, including USA, Russia and China.

Many international forums have called upon ratification of the Convention. UN General Assembly adopted on its 63rd session the resolution on the

existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as a part of promulgation of a state of emergency or simply as a matter of fact; allegations of disappearances". In situations of internal tensions "force is used as a preventive measure to maintain respect for law and order", Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, p. 1355, paras. 4476-7, footnotes omitted. On the other side, *internal disturbances* are "situations in which... exists confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These later can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order", *Ibid.*, 1355, para. 4475.

125 The Convention was opened for signatures on the 6th of February 2007 in Paris and UN Headquarters in New York.

126 Serbia signed the Convention on February 6th 2007.

127 Article 39 of the Convention states that instrument will enter into force on the thirtieth day after deposition of the twentieth instrument of ratification or accession. Status of ratifications according to UN Treaty Collection database, Internet: <http://treaties.un.org/Pages/home.aspx?lang 17/11/2009>.

128 *Ibidem*.

Convention in which it “calls upon States which have not yet done so to consider signing and ratifying the Convention as a matter of priority, as well as to consider the option provided for in articles 31 and 32 of the Convention regarding the Committee on Enforced Disappearances”.¹²⁹ The European Parliament in its resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union’s policy on the matter stated that “it remains concerned about the true commitment to human rights of European Union Member States that refuse to sign the above-mentioned International Convention for the Protection of All Persons from Enforced Disappearance; welcomes the ratification of that convention by Argentina in May 2008, and asks all EU Member States that have not done so to sign and ratify it promptly”.¹³⁰

Besides these quantitative there are certain qualitative indicators on the perspectives of the Convention.

Enforced disappearance is a crime perpetrated in the name of State. Individuals are acting on behalf of State. But paradoxically a State is the actor in which the Convention has vested the power to implement its provisions. We have seen that practice of enforced disappearance is not and will not be in the near future eradicated. Some states (Governments) will not be reluctant to use this method to eliminate its enemies. Can we expect that they will obey the rules of the Convention and efficiently investigate such cases? Sure, there are possibilities for individuals or other State Parties to bring the case before the Committee on Enforced Disappearance. But the competence of the Committee to consider these communications is dependent on State’s declaration that it recognizes such competence.¹³¹ So far, out of 16 States that have accepted the Convention, only 5 of them submitted a declaration recognizing the competence of the CED.¹³² Albania, Argentina, France and Uruguay recognized competence of the CED to receive and consider communications from or on behalf of individuals and communications from State Parties, while

129 Doc: A/RES/63/186, para. 2. In paragraph 3 General Assembly “Requests the Secretary-General and the United Nations High Commissioner of Human Rights to intensify efforts to assist States to become parties to the Convention, with a view to achieving universal adherence”. The resolution was previously adopted by the Third Committee of the GA (Doc: A/C.3/63/L.41).

130 Procedure: 2008/2336 (INI), Document: A6-0264/2009, para. 56.

131 Article 31(1) of the Convention and article 32 of the Convention.

132 See: UN Treaty Collection database, Internet: <http://treaties.un.org/Pages/home.aspx?lang=17/11/2009>.

Japan restricted its recognition only to communications from State Parties.¹³³ We may assume in general that where previous Government has not accepted competence of the CED it is unrealistic to expect that repressive regime that succeeded will do such thing. It is also unrealistic that in such situation there will be impartial and independent judiciary which will apply national legislative measures against enforced disappearance. The Committee may conduct a visit to State Party to investigate allegations on enforced disappearance but only if it has consulted a State Party and received its agreement.¹³⁴ Therefore, it is justified to ask how efficiently a Committee could monitor state's compliance with the provisions of the Convention if activation of its powers is dependent on state's approval.

There is a possibility that Committee brings cases of enforced disappearance that reach the threshold of crimes against humanity under the attention of the UN General Assembly. However, material and personal scope of the crimes against humanity is limited to act of enforced disappearance that is a "part of a widespread or systematic attack directed against any civilian population".¹³⁵ Therefore whole scale of isolated acts of enforced disappearance of non-civilians (e.g. combatants, persons directly participating in hostilities), is left unregulated.¹³⁶

Where this leads us? Is there a perspective for the International Convention for the Protection of All Persons from Enforced Disappearance? Answer lies in the line were the sovereignty of State confronts human rights of individual and depends on the values that one society embraces. In repressive regimes where the survival of the Government is the ultimate value, protection of human rights tends to be a hard task to achieve. It is the environment where the sovereignty of State is a pretext for violations of human rights. On the other side, in a society that embraces rule of law, human rights and sovereignty lie on an equal footing. Although tensions among them may exist, their protection is interdependent. Only State that protects human rights of individuals on her territory will prevent hindering of its sovereignty by other actors in international community. This is the environment where the efforts to protect persons from enforced disappearance will achieve results. It is an environment which will welcome the International Convention for the Protection of All Persons from Enforced Disappearance.

133 Ibidem.

134 Article 33 of the Convention.

135 See: Article 7(1) of the Statute of the International Criminal Court.

136 Article 7 of the Convention.

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Tatjana MILIĆ

**MEĐUNARODNA KONVENCIJA O ZAŠTITI SVIH LICA
OD PRISILNOG NESTANKA**

APSTRAKT

Usvajanje Međunarodne konvencije o zaštiti svih lica od prisilnog nestanka predstavlja uspeh posle decenijske borbe protiv nekažnjivosti ovog strašnog zločina. U ovom članku autor analizira odredbe Konvencije i razmatra problematična pitanja koja zahtevaju preispitivanje optimističnog raspoloženja koje je prevladalo povodom usvajanja ovog dokumenta. U prvom delu predstavljen je problem prisilnih nestanaka. U drugom delu dat je istorijski prikaz pravnog regulisanja ovog problema. Ključni segmenti Konvencije analiziraju se u trećem delu rada, a u poslednjem, četvrtom, delu autor je nastojao da razmotri perspektivu primene odredbi Konvencije.

Ključne reči: prisilni nestanak, ljudska prava, Međunarodna konvencija o zaštiti svih lica od prisilnog nestanka, Komitet o prisilnim nestancima.